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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 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 timely register (and then periodically re-register) during designated periods, satisfy residence and physical presence requirements, are admissible to the United States, were not firmly resettled in another country, and are not subject to certain criminal- and security-related bars.

The Director of the Vermont Service Center denied the application for re-registration and withdrew the Applicant’s TPS, concluding that the Applicant was ineligible for TPS because he had been convicted of two misdemeanor offenses in the United States.

On appeal, the Applicant asserts that, given the nature of the offenses of which he was convicted and the fact that he was never incarcerated, denial of his TPS on that basis is inconsistent with the humanitarian purpose of the program as well as U.S. Citizenship and Immigration Services (USCIS) policy.

Upon de novo review, we find that the Applicant has overcome the reason for the denial. The matter will be remanded for the Director to determine if all other eligibility grounds for TPS have been met.

I. Law

The Director may withdraw TPS status if the applicant was not in fact eligible at the time TPS was granted or later becomes ineligible. 8 C.F.R. § 244.14(a)(1). An individual is ineligible for TPS if he or she has been convicted of any felony or two or more misdemeanors committed in the United States. Section 244(c)(2)(B)(i) of the Act. Department of Homeland Security (DHS) regulations define felony as a crime “punishable by imprisonment for a term of more than one year, regardless of the term actually served,” with the exception of an offense defined by the State as a misdemeanor where the sentence actually imposed is one year or less regardless of the term actually served, which is treated as a misdemeanor. 8 C.F.R. § 244.1. DHS regulations define misdemeanor as a crime “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.” 8 C.F.R. § 244.1. That regulation further provides that “any crime punishable by

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imprisonment for a maximum term of five days or less shall not be considered a felony or misdemeanor."

Section 101(a)(48)(A) of the Act provides two definitions of conviction. First, a conviction means a formal judgment of guilt entered by a court. Second, if adjudication of guilt has been withheld, a conviction exists for immigration purposes where a judge or jury has found the foreign national guilty or the foreign national has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and the judge has ordered some form of punishment, penalty, or restraint on the foreign national’s liberty.

II. ANALYSIS

The issue on appeal is whether the Applicant’s convictions for disorderly person and operating a motor vehicle while under the age of 21 years with any bodily alcohol content are misdemeanors for the purposes of TPS eligibility. The Applicant does not contest that he was convicted of those offenses. Rather, he argues that USCIS has previously issued memoranda,\(^1\) which clarify that certain state violations may not be considered misdemeanors in the context of TPS eligibility even if they are punishable by more than five days of incarceration, and indicates that his convictions should be re-evaluated in light of this policy.

We will not address this argument because, after review of the entire record, we find that only the Applicant’s disorderly person conviction meets the regulatory definition of a misdemeanor. As the Applicant has been convicted of only one misdemeanor, the sole reason for the denial of the application and withdrawal of TPS has been overcome. Accordingly, we will remand the matter to the Director to determine if the Applicant has met all other eligibility requirements for TPS.

A. Convictions

As stated above, the Director found that the Applicant was ineligible for TPS under section 244(c)(2)(B)(i) of the Act based on two misdemeanor convictions. The record reflects the following criminal history:

1. In 2014, the Applicant pleaded \textit{nolo contendere} to disorderly person in violation of section 750.167 of the Michigan Compiled Laws Annotated (Mich. Comp. Laws Ann.) and was placed on 12-months of probation and ordered to pay a fine, costs, and fees. Because the

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\(^1\) The Applicant references two policy memoranda: Memorandum from Donald Neufeld, Associate Director, Service Center Operations, USCIS, and Perry J. Rhew, Chief, Administrative Appeals Office, USCIS, \textit{Temporary Protected Status (TPS) adjudications involving New York Traffic infractions or New York violations} (January 17, 2010); and Memorandum, USCIS, \textit{Temporary Protected Status Adjudications Involving “No Jail” or “No Incarceration” Certifications, and Reminder for Cases Involving Certain Potential Misdemeanors: Revisions to the Adjudicator’s Field Manual (AFM) Chapter 38.1(e)(12); AFM Update AD11-21} (January 21, 2011); both available at http://www.uscis.gov/laws/policy-memoranda.
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Applicant entered a plea of nolo contendere and the judge ordered punishment, the Applicant was convicted of this offense for immigration purposes.

2. In 2001, the Applicant was arrested and charged with operating a motor vehicle while under the age of 21 years with any bodily alcohol content in violation of section [redacted] of the City of [redacted] Michigan, traffic ordinance. He pleaded guilty to the offense and was placed on probation for 12 months and ordered to pay a fine, costs, and fees. Accordingly, the Applicant was also convicted of this offense for immigration purposes.

Based on the above, we affirm that the Applicant was convicted of two offenses.

B. Classification of Offenses

We find, however, that only one of the above offenses is a misdemeanor for TPS eligibility. The regulatory definitions for misdemeanor or felony are based on the severity of the penalty provided in relevant state laws. See 8 C.F.R. § 244.1. If an offense is not punishable by imprisonment, or if the maximum penalty possible does not exceed five days of imprisonment, the offense is not considered a felony or misdemeanor for TPS purposes. Id.

1. Disorderly Person

At the time of the Applicant’s conviction for the above offense, Mich. Comp. Laws Ann. § 750.168 provided that an individual convicted of being a disorderly person is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500, or both. Accordingly, because the punishment for this offense was imprisonment of more than five days and not more than one year, the Applicant’s conviction meets the definition of misdemeanor under the TPS regulations.

2. Operating a Motor Vehicle While Under 21 With Any Bodily Alcohol Content

As stated above, the Applicant’s arrest record indicates he was charged with violation of section [redacted] of the [redacted] local city ordinance. At the time of the Applicant’s conviction in 2001, that section [redacted] provided, in pertinent part:

(4) A person who is less than 21 years of age, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within the City of [redacted] if the person has any bodily alcohol content . . . .

2 The provisions of section [redacted] of the City of [redacted] traffic ordinance, as it existed in 2001, were identical with the corresponding provisions of Mich. Comp. Laws Ann. § 257.625 (2001), except the word “state” in the statute was substituted with “City of [redacted]” in the ordinance.

(9) If a person is convicted of violating subsection (4), all of the following apply:

(a) Except as otherwise provided in subdivision (b), the person is guilty of a misdemeanor punishable by 1 or both of the following:

(i) Community service for not more than 45 days.

(ii) A fine of not more than $250.00.

(b) If the violation occurs within 7 years of 1 or more prior convictions, the person may be sentenced to 1 or more of the following:

(i) Community service for not more than 60 days.

(ii) A fine of not more than $500.00.

(iii) Imprisonment for not more than 93 days.

The provisions of section of the City of traffic ordinance, as it existed in 2001, were identical with the corresponding provisions of Mich. Comp. Laws Ann. § 257.625 (2001), except the word “state” in the statute was substituted with “City of” in the ordinance. Although the offense is classified as a misdemeanor under both city ordinance and the state law, the first violation is punishable only by community service and a fine. While the ordinance and the statute provide for imprisonment for up to 93 days in the case of a person with prior convictions, there is nothing in the record to suggest that the Applicant’s 2001 conviction was his second or subsequent offense and, thus, that he was subject to punishment described in section of the ordinance. Accordingly, based on the above, we conclude that the Applicant’s 2001 conviction is not considered a misdemeanor under the TPS regulations.

III. CONCLUSION

The Applicant has only one misdemeanor conviction, which does not render him ineligible for TPS. Because the sole reason for the denial of the application has been overcome, we will remand the matter to the Director to determine whether the Applicant meets other requirements for TPS.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as Matter of L-E-H-B-, ID# 572424 (AAO Aug. 4, 2017)