



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

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

In Re: 29466035

Date: DEC. 19, 2023

Motion on Administrative Appeals Office Decision

Form I-821, Application for Temporary Protected Status

The Applicant, a national of El Salvador, seeks Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254a.

The Director of the California Service Center denied the TPS request in March 2004, concluding that the Applicant was ineligible for such status because he had been convicted of two or more misdemeanor offenses committed in the United States. We dismissed the Applicant's appeal on the same ground in December 2004.

The matter is now before us on a motion to reopen. The Applicant submits evidence concerning his criminal history, and asserts that reopening of these proceedings is warranted because he is now eligible for the relief he is seeking.

Upon de novo review, we will dismiss the motion to reopen.

I. LAW

A motion to reopen must be filed within 30 calendar days of the decision it seeks to reopen (or within 33 calendar days if we mailed the decision), unless the applicant demonstrates that the delay was reasonable and beyond their control. 8 C.F.R. § 103.5(a)(1)(i). U.S. Citizenship and Immigration Services (USCIS) has sole discretion to determine whether the applicant demonstrated that the delay was reasonable and beyond their control. *Id.*

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the benefit sought. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

As previously discussed, a noncitizen convicted of two or more misdemeanors committed in the United States is ineligible for TPS. Section 244(c)(2)(B) of the Act.

II. ANALYSIS

The Applicant's motion does not meet the above requirements because it is untimely, and the evidence he submits is not sufficient to demonstrate eligibility for TPS.

A. Exception to Timely Motion Filing Not Established

The Applicant's motion is untimely, and he has not shown that the delay in filing was reasonable and beyond his control.

In dismissing the Applicant's appeal in 2004, we determined that he was ineligible for TPS because he was convicted of two or more misdemeanor offenses committed in the United States. Specifically, the record of proceedings at the time reflected that in 2002 the Applicant was convicted upon a plea of guilty of (1) false representation of identity to a peace officer in violation of California Penal Code (Cal. Penal Code) § 148.9 (false representation of identity), and (2) driving without a valid driver's license in violation of California Vehicle Code § 12500(a) (driving without a license). A year later he was convicted of drinking in public in violation of section [redacted] of the [redacted] ordinance, which also appeared to be a misdemeanor offense.¹

He is now requesting us to reopen our 2004 decision and grant him TPS. The Applicant states, citing *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), that the delay in filing the motion was due to ineffective assistance of his legal representatives, two subsequent car collisions, and hospitalization related to a Covid-19 infection. In support, he submits a personal statement, copies of attorney/client contracts dated in 2014 and complaints he filed against two of his former attorneys in 2023, as well as evidence concerning the 2018 and 2020 traffic collisions and 2021 treatment for Covid pneumonia.

In his statement, the Applicant explains that although he timely appealed the 2004 denial of his initial TPS request, the individual who assisted him in filing the appeal did not advise him of our adverse decision; he therefore thought that the appeal was pending and only later discovered that it was dismissed. The Applicant further states that in January 2014, after learning that he was ineligible for TPS due to his misdemeanor convictions,² he hired an attorney to file a motion with the court to "reduce the unlicensed driver charge to an infraction." He explains that he was subsequently informed that the motion was granted in April 2014 and, believing that he had only one misdemeanor conviction, he retained counsel from the same law firm to represent him in reapplying for TPS. The Applicant states that thereafter he "did not receive much update on the status of [his] case" and the law office ultimately informed his current counsel that they did not have a file for him, even though he signed a contract with them in May 2014. He avers that the ineffective assistance of counsel, the traffic collisions, and the global pandemic amount to extraordinary circumstances that affected his ability to pursue TPS.

We acknowledge the Applicant's statements; however, the evidence does not support a conclusion that the delay in filing the instant motion was reasonable and due to circumstances beyond his control.

¹ See [redacted] Code of Ordinances, § [redacted] Drinking in public deemed misdemeanor—Exceptions (as in effect since 1975), [http://\[redacted\].ca.elaws.us/code/\[redacted\]](http://[redacted].ca.elaws.us/code/[redacted]).

² We note that the Applicant was informed of his ineligibility for TPS on criminal grounds in the 2004 TPS denial; he previously submitted a 2003 certified court record of convictions and acknowledged his criminal history on appeal.

The record reflects that the Applicant was properly advised of his ineligibility for TPS in the 2004 denial and our decision dismissing his appeal issued the same year. Furthermore, we mailed the appeal dismissal notice to the Applicant's address of record at the time, and there is no indication that the notice was returned to USCIS as undeliverable. This evidence is not consistent with the Applicant's claims that he was unaware of his ineligibility for TPS on criminal grounds and did not know that his appeal was dismissed until sometime in 2014.

To the extent the Applicant makes an ineffective assistance of counsel claim, we note that he has not complied with the requirements described in *Matter of Lozada*, 19 I&N Dec. at 639; *see also U.S. v. Lopez-Chavez*, 757 F.3d 1033, 1041 (9th Cir. 2014) (finding that to establish ineffective assistance of counsel in immigration proceedings in violation of the right to due process, a noncitizen must show: (1) that the proceeding was so fundamentally unfair that they were prevented from reasonably presenting their case, and (2) prejudice) (internal quotation marks and citation omitted). The Applicant does not provide evidence that the individual he claims he hired to assist him in appealing the 2004 TPS denial was an attorney, or that he had an agreement with that individual to represent him in TPS proceedings. Rather, the record shows that the Applicant was "self-represented" when he filed the appeal in late March 2004; it does not include a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, or any other evidence indicating that the Applicant authorized someone else to act on his behalf in matters concerning the appeal.

We acknowledge the Applicant's assertions and evidence that in 2014 he retained counsel to file a motion to modify one of his convictions³ and to represent him in TPS proceedings, and recognize his claim that the assistance of counsel in those proceedings was not effective. However, as this occurred almost 10 years after we dismissed the Applicant's appeal explaining that he was ineligible for TPS on criminal grounds, and there is no evidence (aside from the Applicant's statement) that he was unaware of the dismissal, we cannot conclude that the 18-year delay in filing the instant motion was reasonable and beyond his control.

Lastly, we acknowledge that the Applicant reapplied for TPS in 2014 and 2015,⁴ and that he experienced a series of unfortunate events which may have affected his ability to pursue TPS after 2018. Nevertheless, because those events occurred many years after we dismissed his appeal, we do not consider them circumstances beyond the Applicant's control that prevented him from timely filing a motion to reopen our 2004 adverse decision.

B. Evidence Insufficient to Establish Eligibility for TPS

Even if the Applicant had established an exception to the timely filing (which he did not for the reasons discussed above), we would still dismiss his motion because the evidence he submits is not sufficient to show that he is not subject to the criminal grounds of ineligibility for TPS.

³ The 2014 attorney/client contract is for the attorney "to move to reduce the unlicensed driver charge to an infraction."

⁴ The applications were denied in 2014 and 2016, respectively, explaining that the Applicant was ineligible for TPS re-registration and related benefits, because his initial TPS request was denied in 2004 and his appeal was dismissed.

The Applicant asserts that he is no longer barred from TPS because he has only one misdemeanor conviction, for drinking in public, and his two other misdemeanor convictions were vacated due to a legal defect. In support, he submits a certified California court transcript.

The Applicant bears the burden of proving that a state court conviction was vacated because of a substantive or procedural defect in the criminal proceedings, and not solely for immigration purposes or for rehabilitative or equitable reasons. *Balinas-Lucero v. Garland*, 44 F.4th 1169, 1171-72 (9th Cir. 2022). To meet this burden, an applicant should provide as much information and documentation as possible relating to the reasons they requested to have the conviction amended or modified, including but not limited to copies of the order and motion filed with the court that issued the order. *Matter of Dingus*, 28 I&N Dec. 529, 536 (BIA 2022).

Here, the Applicant does not submit the court order vacating the convictions or a copy of the motion underlying that order to show that the convictions were vacated due to substantive or procedural errors in the criminal proceedings and are no longer valid for immigration purposes.

The Applicant therefore has not demonstrated that he is eligible for the benefit sought, and reopening of his TPS proceedings is not warranted for this reason, in addition to the untimely motion filing.

III. CONCLUSION

The Applicant has not demonstrated that the significant delay in filing the instant motion to reopen was reasonable and beyond his control, and he has not provided evidence sufficient to establish eligibility for TPS. Consequently, reopening of the Applicant's TPS proceedings is not warranted at this time.

ORDER: The motion to reopen is dismissed.