



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

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

In Re: 23417979

Date: JAN. 3, 2023

Appeal of Vermont Service Center Decision

Form I-821, Application for Temporary Protected Status

The Applicant seeks review of a decision withdrawing her Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254a.

The Director of the Vermont Service Center withdrew the Applicant's TPS, concluding that she was no longer eligible for such status because of two or more misdemeanor convictions. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

U.S. Citizenship and Immigration Services (USCIS) may withdraw TPS if the applicant was not in fact eligible at the time they were granted such status or later becomes ineligible. 8 C.F.R. § 244.14(a)(1). Individuals who were convicted of two or more misdemeanors committed in the United States are ineligible for TPS. Section 244(c)(2)(B)(i) of the Act.

For TPS purposes, any crime punishable by imprisonment for a term of one year or less, regardless of the term actually served if any, is considered a misdemeanor except when the maximum possible term of imprisonment for the crime does not exceed five days. 8 C.F.R. § 244.1.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), 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 individual guilty or the individual 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 individual's liberty.

II. ANALYSIS

The issue on appeal is whether the Applicant is ineligible for TPS on criminal grounds.

The record reflects the following criminal history relevant to the Applicant's eligibility:

1. In 2019, the Applicant pleaded guilty to driving without a license (DWL) in violation of section 46.2-300 of the Virginia Code, and was ordered to pay a fine and court costs.¹
2. In [] 2020, the Applicant was again convicted of DWL upon a plea of guilty and ordered to pay a fine and court costs.
3. In 2021, the Applicant pleaded *nolo contendere* to DWL; the court found her guilty of the offense and ordered her to pay a fine and court costs.
4. In 2021, the Applicant was convicted twice of willful failure to appear before any court or judicial officer as required after having been charged with a felony offense or misdemeanor offense or released on a summons (failure to appear), in violation of section 18.2-456(6) of the Virginia Code.

Under Virginia law, DWL is a Class 2 misdemeanor punishable, in part by confinement in jail for not more than six months and a fine of not more than \$1,000, either or both. Va. Code Ann. §§ 46.2-300 and 18.2-11(b). Because the maximum possible term of imprisonment for DWL is more than five days but less than one year, the offense meets the definition of a misdemeanor in 8 C.F.R. § 244.1.

Failure to appear is a Class 1 misdemeanor punishable, in part by confinement in jail for not more than twelve months and a fine of not more than \$2500, either or both. Va. Code Ann. §§ 18.2-19.2-128(C) and 18.2-11(a). As the maximum penalty possible for failure to appear is imprisonment for more than five days but not more than one year, the offense also qualifies as a misdemeanor for TPS purposes.

As stated, the Director determined that the Applicant was convicted of two or more misdemeanor offenses and that she was therefore barred from TPS under section 244(c)(2)(B)(i) of the Act.

The Applicant does not contest that she was convicted of the above offenses. Instead, she asserts that all of them were "mere traffic offenses" and should not be considered misdemeanors. In support, the Applicant references Form I-821 Instructions,² which provide in part that TPS applicants "do not need to submit documentation for traffic fines and incidents (unless the traffic fines or incidents were alcohol- or drug-related) that did not involve an actual arrest if the penalty was only a fine of less than \$500." The Applicant points out that all of the fines she was ordered to pay for her convictions were less than \$500, and only the two failure to appear charges resulted in an arrest. She states that because traffic offenses are generally not disqualifying for TPS applicants, her convictions of such offenses should not be a basis for TPS withdrawal. However, the Applicant misinterprets the Form I-821 instructions, which further provide that applicants arrested for any traffic offense must submit disposition documentation so USCIS can properly assess whether the convictions relate to their TPS

¹ We note that the Applicant did not previously disclose this additional conviction, and the Director did not consider it in withdrawing the Applicant's TPS.

² See Instructions for Form I-821, page 11 <https://www.uscis.gov/i-821>

eligibility.³ Here, the Applicant confirms that she was arrested for failure to appear in court on DWL charges.

More importantly, we determine whether an offense is a misdemeanor for TPS purposes based on the maximum penalty that *may* be imposed for the offense under the statute in effect at the time of conviction, and not the penalty that *was* actually imposed. Accordingly, in evaluating whether an offense is a misdemeanor we look at how the state chooses to classify and punish that particular offense. As discussed, the maximum penalty possible for DWL and failure to appear under Virginia law is imprisonment for up to six months, and for up to one year, respectively, which qualifies those offenses as misdemeanors under 8 C.F.R. § 244.1. Because the Applicant was convicted of two or more such offenses, she is not eligible for TPS.

The Applicant claims, citing *Padilla v. Kentucky*, 559 U.S. 356 (2010), that she was denied the effective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution, because her attorney did not properly advise her of the consequences the convictions might have on her immigration status. However, the U.S. Supreme Court's holding in *Padilla* (that the Sixth Amendment requires criminal defense counsels to advise their noncitizen clients about the risk of deportation arising from a guilty plea), does not change the validity of a conviction for immigration purposes, unless the conviction is subsequently vacated based on a ruling that it was legally defective. See *Matter of Thomas & Matter of Thompson*, 27 I&N Dec. 674, 676 (A.G. 2019) (holding that state court orders that modify, clarify, or otherwise alter a sentence are only considered for immigration purposes if the order is based on procedural or substantive defects in the criminal proceeding). We acknowledge the submission of a copy of the Applicant's petition for a writ of *habeas corpus*;⁴ however, absent evidence that a state court overturned her convictions for procedural or substantive defects, we must conclude that she remains convicted of five misdemeanor offenses committed in the United States and is therefore statutorily ineligible for TPS.

Lastly, we recognize the Applicant's statements that she has been residing in the United States since 1998, has strong family ties in the country, is employed, and pays taxes. Although those are positive considerations, there is no waiver or exception available for individuals who like the Applicant are ineligible for TPS on criminal grounds.

In conclusion, the Applicant has not established that the five offenses of which she was convicted are not considered misdemeanors for TPS purposes or that they otherwise do not affect her eligibility for TPS. Consequently, the Applicant has not overcome the grounds for the withdrawal of her TPS.

ORDER: The appeal is dismissed.

³ See Instructions for Form I-821, *supra*.

⁴ The Applicant does not explain if and/or when she filed this petition with a court.