U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19938433

Date: FEB. 9, 2022

Appeal of California Service Center Decision

Form I-821, Application for Temporary Protected Status

The Applicant, a national of El Salvador, seeks review of a denial of his Temporary Protected Status (TPS) request under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254a, and a related waiver to waive inadmissibility grounds.

The Director denied the Form I-821, concluding that the Applicant was statutorily ineligible for TPS due to his criminal convictions. The Director also denied the Applicant's Form I-601, Application for Waiver of Ground of Excludability, explaining that there was no provision for a waiver of criminal grounds of ineligibility for TPS.

On appeal, the Applicant asserts that although he did file a waiver request, he is not inadmissible to the United States. He further states that his conviction for "drug possession" was eliminated when he completed a drug diversion program and is therefore not a ground of inadmissibility.

The burden of proof in these proceedings rests solely with the Applicant. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal because the Applicant has not met this burden.

I. LAW

An applicant is ineligible for TPS if they have been convicted of any felony or two or more misdemeanors committed in the United States. Section 244(c)(2)(B) 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. The same 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." *Id.* The regulations further provide that "any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a felony or misdemeanor." *Id.*

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

As an initial matter, we note that that the Director denied TPS solely on criminal grounds and did not make any findings concerning the Applicant's inadmissibility. Rather, the record reflects that the Applicant filed his Form I-601 indicating that he was inadmissible to the United States because he had a "conviction for under the influence of a controlled substance." Accordingly, we will consider only whether the Applicant is precluded from TPS on criminal grounds regardless of any inadmissibility that may apply.

The record reflects that in 1991 the Applicant was convicted of receiving stolen property in violation of section 496 of the California Penal Code, which provided at the time that a person convicted of this offense "shall be punished by imprisonment in a state prison, or in a county jail for not more than one year." The record shows that the Applicant was sentenced to 365 days of incarceration and 36 months of probation for this offense. Because the maximum sentence possible for receiving stolen property is imprisonment for a term of "not more than one year," the offense qualifies as a misdemeanor for TPS purposes. The Applicant does not contest that he was convicted of this offense or that it is a misdemeanor.

In 1998, the Applicant was arrested and charged with using or being under the influence of a controlled substance in violation of section 11550(a) of the California Health and Safety Code, which provided at the time that "[a]ny person convicted of [this offense] is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days or more than one year in the county jail." Because the offense is punishable by a jail sentence of one year or less but more than five days it qualifies as a misdemeanor under the regulations at 8 C.F.R. § 244.1.

The Applicant submits a document from Corrections Services Agency referencing a "deferred entry of judgment," which confirms that in [redacted] 1999 he successfully met the requirements of a certified drug treatment program under section 1000.1 of the California Penal Code. He also submits court records reflecting that the case was ultimately dismissed in [redacted] 2000, upon successful completion of probation. However, the same court records show that the Applicant pled guilty to this offense in [redacted] 1998; the court placed him on diversion for 24 months, ordered him to attend a drug treatment program, and advised him that if he failed to do so a warrant would be issued for his arrest.

As stated above, the statutory definition of conviction includes deferred adjudications where an applicant has entered a plea of guilty or *nolo contendere*, or admits sufficient facts to support a finding of guilt, and some form of punishment, penalty, or restraint on liberty is imposed. Therefore, if an individual pleads guilty or *nolo contendere*, or is found guilty but the court defers entry of the judgment to allow the individual to complete a period of probation or a diversion program, the individual has been convicted for immigration purposes even if the charge is ultimately dismissed. *See* e.g., *Matter*

of Marroquin, 23 I&N Dec. 705, 714-15 (A.G. 2005); *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). *See also Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017) (Entry into a pretrial intervention agreement under Texas law qualified as a "conviction" for immigration purposes under section 101(a)(48)(A) of the Act, where an individual admitted sufficient facts to warrant a finding of guilt at the time of his entry into the agreement, and the judge authorized the agreement ordering the individual to participate in the pretrial intervention program).

Here, the record shows that the Applicant pled guilty to using or being under the influence of a controlled substance, a misdemeanor offense, and the court sentenced him to probation and completion of a drug treatment program. Accordingly, as the Applicant entered a plea of guilty and the court imposed punishment the Applicant was "convicted" of using or being under the influence of a controlled substance, as this term is defined in section 101(a)(48)(A) of the Act.

The Applicant therefore was convicted of at least two misdemeanor offenses[1] in the United States, and he is statutorily ineligible for TPS on that basis pursuant to section 244(c)(2)(B) of the Act.

There is no waiver or exception available, even for humanitarian or family unity reasons for individuals who like the Applicant are barred from TPS on criminal grounds.

ORDER: The appeal is dismissed.

[1] The record reflects that the Applicant has subsequent disqualifying criminal history. Specifically, in 2010 he was convicted of gross vehicular manslaughter while intoxicated in violation of section 191.5(b) of the California Penal Code, and sentenced to 24 months in prison. In 2014, he was convicted of driving under the influence within 10 years of a prior felony vehicular manslaughter conviction in violation of section 23550.5(b) of the California Vehicle Code, and sentenced to three years of prison. Because the maximum punishment possible for each offense includes imprisonment for a term of more than one year, both offenses meet the definition of "felony" for TPS purposes.