



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

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

In Re: 21482175

Date: JUN. 29, 2022

Motion on Administrative Appeals Office Decision

Form I-821, Application for Temporary Protected Status

The Director of the Vermont Service Center denied the Applicant's re-registration and withdrew his Temporary Protected Status (TPS). Immigration and Nationality Act (the Act) section 244, 8 U.S.C. § 1254a. The Director concluded that the Applicant was ineligible for TPS because he had been convicted of two misdemeanors as they are defined for TPS purposes. We affirmed the decision on appeal.

The Applicant filed a motion to reconsider our decision, which was rejected because he identified a form type as the subject of the motion that is not within our jurisdiction, and we dismissed a subsequent corrected motion as untimely filed.¹ The Applicant submitted a second motion to reconsider, requesting that we reconsider our prior decision because the untimeliness of his filing was due to a clerical error. We dismissed the second motion as it did not show that our prior decision was based on an incorrect application of law or policy or that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). The matter is now before us on a third motion to reopen and reconsider. Upon review, we will dismiss the motions.

On instant motion, the Applicant argues that his previous untimely filing was due to ineffective assistance of his prior counsel as she failed to appropriately notate the Form I-290B, Notice of Appeal or Motion. He asserts that he meets requirements under *Matter of Lozada* 19 I&N Dec 637 (BIA 1988).² The Applicant does not, however, further address the finding that he is ineligible for TPS because he has two misdemeanor convictions.

An individual 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. The Department of Homeland Security (DHS) regulation defines a misdemeanor to include a crime punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served. 8 C.F.R.

¹ The Form I-290B identified the subject of the motion as Form I-821D, Consideration of Deferred Action for Childhood Arrivals instead of Form I-821, Application for Temporary Protected Status.

² In *Lozada* the Board of Immigration Appeals established a framework for asserting claims of ineffective assistance of counsel to include a written affidavit from the noncitizen, evidence former counsel was informed of the allegation and given opportunity to respond, and evidence that a complaint was filed with the appropriate disciplinary authorities or an explanation why no complaint was filed.

§ 244.1. Section 101(a)(48)(A) of the Act provides two definitions of conviction: a formal judgment of guilt entered by a court; and, 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.

The Director found the Applicant was ineligible for TPS because he was convicted of two misdemeanors: driving under the influence in 2011 and stopping/parking an unattended vehicle in 2018. On appeal, the Applicant conceded that he was convicted of a misdemeanor for driving under the influence but disputed that the finding of guilt for the offense of stopping/parking an unattended vehicle was a conviction for immigration purposes. He asserts that in Georgia, where the offense occurred, stopping/parking an unattended vehicle is not considered a crime or a misdemeanor, but rather a municipal ordinance violation, so it does not render him ineligible for TPS. In dismissing the appeal, a decision incorporated here by reference, we concluded that the Applicant was convicted of stopping/parking an unattended vehicle, as a municipal court judge found the Applicant guilty and kept a cash bond as punishment, and the conviction was for a misdemeanor, as the municipal code provided for the general punishment of an ordinance violation with a maximum prison sentence of not more than 180 days.³

The Applicant further argued that his municipal ordinance violation was not a crime because he was not provided due process warnings for how a conviction could impact his immigration status and because municipal courts do not uniformly hold defendants to the evidentiary standard of "beyond all reasonable doubt." The Applicant cited a 2010 U.S. Citizenship and Immigration Services (USCIS) policy memorandum stating that offenses classified as traffic infractions or violations under New York Penal Law are not disqualifying misdemeanors for TPS purposes although they do not satisfy the regulatory exception of imprisonment for a maximum term of five days or less.⁴ We determined that although Georgia does not classify the Applicant's offense as a misdemeanor and imposes a lesser maximum punishment for an ordinance violation, similar to New York infractions, the Applicant did not establish the offense would not satisfy the requirements for a criminal conviction under section 101(a)(48)(A) of the Act.

In *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004), the Board of Immigration Appeals found that when an offense was not subject to proof beyond a reasonable doubt and other constitutional requirements for criminal proceedings, it was not a criminal conviction under section 101(a)(48)(A) of the Act. We found that Georgia state law provides that prosecutions for ordinance violations may be tried upon citations with or without a prosecuting attorney and upon accusations and that

³ The Applicant contended that a misdemeanor is defined as a crime punishable by imprisonment for one year or less, whereas his crime was only punishable for six months or less and was thus not a misdemeanor. However, 8 C.F.R. § 244.1 defines a misdemeanor as a crime punishable by imprisonment for a term of one year or less and specifies that any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a felony or misdemeanor. Thus, any crime punishable by a term of imprisonment of six days to one year would be a misdemeanor for TPS purposes.

⁴ USCIS Policy Memorandum, *Temporary Protected Status (TPS) adjudications involving New York Traffic infractions or New York violations* 2 (Jan. 17, 2010), <https://www.uscis.gov/laws/policy-memoranda>. The memorandum explains that this category of offenses should be exempted from the TPS definition of a misdemeanor because offenses classified as "traffic infractions" would not satisfy the requirements for a "criminal" conviction under section 101(a)(48)(A) of the Act.

“prosecution” means all legal proceedings by which liability for a crime is determined. We determined that defendants charged with ordinance violations have requisite constitutional safeguards, including the right to counsel, and that the Applicant submitted insufficient evidence that the adjudication of guilt in cases of municipal ordinance violations in Georgia requires a lesser standard of proof than “beyond a reasonable doubt.”⁵ We concluded that the Applicant did not demonstrate that his offense was not a criminal conviction as defined under section 101(a)(48)(A) of the Act or that it was outside the scope of the “misdemeanor” definition in 8 C.F.R. § 244.1 based on its classification as a municipal ordinance violation.

The Applicant argues that his initial motion to reconsider our dismissal of his appeal was untimely filed due to ineffective assistance of his prior counsel. Even if we found that the Applicant had met the requirements for asserting a claim of ineffective assistance, he has not established that our initial decision dismissing his appeal was based on an incorrect application of law or policy. The record shows that the Applicant was convicted of at least two misdemeanors, as defined under 8 C.F.R. § 244.1, and he is thus not eligible for TPS. An applicant for TPS has the burden of proving that they meet the requirements for this benefit and are otherwise eligible under the provisions of section 244 of the Act. Section 291 of the Act, 8 U.S.C. § 1361. Here the Applicant has not met that burden.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.

⁵ See generally *Carter v. State*, 578 S.E.2d 508, 511 (Ga. App. 2003) (concluding that the evidence was sufficient for any rational trier of fact to find the defendant guilty beyond a reasonable doubt of violating the ordinances); *Poole v. State*, 494 S.E.2d 251 (Ga. App. 1997) (reversing a conviction where the State failed to meet its burden of proving beyond a reasonable doubt that the defendant’s public intoxication violated any local ordinance).