U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28838751

Date: NOV. 13, 2023

Appeal of California Service Center Decision

Form I-821, Application for Temporary Protected Status

The Applicant, a national of Haiti, 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 Form I-821, concluding that the Applicant did not establish, as required, that he had not been convicted of a felony or two or more misdemeanor offenses committed in the United States. On appeal, the Applicant submits additional evidence concerning his arrests and dispositions of the related charges.[1]

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

A noncitizen is ineligible for TPS, in part, 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 "misdemeanor" as any crime punishable by imprisonment for a term of one year or less, regardless of the term actually served if any, 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 the term "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.

[1] The Applicant does not provide a statement or a brief for us to consider.

II. ANALYSIS

The sole issue on appeal is whether the Applicant has met his burden of proof to show that he is not barred from TPS on criminal grounds. Upon review of the record as supplemented on appeal we conclude that he has not.

A. Criminal History and Classification of Offenses

The Applicant's criminal record, identified by the Director as relevant to his TPS eligibility, shows the following:

In 2016, the Applicant was charged with:

- Domestic battery in violation of Kansas Statutes Annotated (Kan. Stat. Ann.) § 21-5414(a)(1), a Class B person misdemeanor punishable, in part, by "not less than 48 consecutive hours nor more than six months imprisonment";[2]
- Criminal restraint in violation of Kan. Stat. Ann. § 21-5411(a), a Class A person misdemeanor punishable, in part, by "a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed one year";[3]
- Interference with law enforcement in violation of Kan. Stat. Ann. § 21-5904(a)(1), a Class A nonperson misdemeanor punishable, in part, by "a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed one year."[4]

In 2018, the Applicant was arrested and charged with driving under the influence of alcohol (DUI) in violation of Kan. Stat. Ann. § 8-1567(a)(2) (where the alcohol concentration in the person's blood or breath is 0.08 or more). A first conviction under the statute is a class B misdemeanor, for which the penalty includes a minimum sentence of 48 hours and a maximum sentence of six months imprisonment.[5]

Because the maximum possible penalties for Class A and Class B misdemeanors under Kansas law include jail time for more than five days, but no more than one year, they qualify as misdemeanors for TPS purposes. Consequently, to establish eligibility for TPS the Applicant must show that he was not convicted of two or more of the above charges.

B. Procedural History

In support of the instant TPS request, the Applicant submitted court documents dated in 2016 and 2020 indicating that some of the charges were dismissed after he had completed diversion programs. The Director issued a request for evidence (RFE) asking the Applicant to provide copies of the diversion agreements listing the charges, any pleas he may have entered, and the final outcome of each charge listed. In response, the Applicant submitted additional documents, which included a complaint and motion to dismiss related to the DUI charge; a 2021 complaint and notice to appear on traffic-

[2] *See* Kan. Stat. Ann. § 21-541(c)(1)(A).
[3] *See* Kan. Stat. Ann. §§ 21-5411(b) and 21-6602(1).
[4] *See* Kan. Stat. Ann. §§ 21-5904(b)(1)(A) and 21-6602(1).
[5] *See* Kan. Stat. Ann. § 8-1567(b)(1).

related charges and an order for fast track dismissal; a complaint, motion to dismiss, and an order to dismiss the 2018 DUI charge "upon successful completion of Diversion and payment of any and all costs"; as well as a motion for dismissal of the 2016 domestic battery charge "with prejudice to the [Applicant's] successful completion of the Diversion program," and an order dismissing the charge.

As stated, the Director denied the TPS request, explaining that this evidence was not adequate to establish that the Applicant was not convicted for immigration purposes of one or more charged offenses, because it did not show if and how he pleaded to each charge, or whether he admitted sufficient facts to warrant a finding of guilt as part of the diversion program. The supplemental evidence the Applicant submits on appeal does not overcome the Director's adverse determination.

C. Supplemental Evidence

The supplemental evidence consists of the diversion agreement concerning the 2018 DUI charge and a court-certified case summary report regarding the 2016 charges of domestic battery, interference with law enforcement, and criminal restraint. Our review of the DUI diversion agreement indicates that the Applicant was "convicted" of this offense within the meaning of section 101(a)(48)(A) of the Act, because in return for the grant of diversion he admitted sufficient facts to warrant a finding of guilt, and was ordered to comply with certain conditions to have the charge dismissed. However, as he still does not submit the diversion agreement underlying the dismissal of the 2016 misdemeanor charges against him, the record remains insufficient to determine whether he has been convicted of additional misdemeanor offenses.

1. DUI

As stated, the DUI charge against the Applicant was dismissed after he completed the diversion program. Kansas Statutes Annotated § 22-2909(c) provides in pertinent part that if a diversion agreement is entered into in lieu of further criminal proceedings on a complaint alleging a violation of § 8-1567 [DUI], the diversion agreement must include a stipulation, agreed to by the defendant, the defendant's attorney if the defendant is represented by an attorney and the attorney general or county or district attorney, of the facts upon which the charge is based and a provision that if the defendant fails to fulfill the terms of the specific diversion agreement and the criminal proceedings on the complaint are resumed, the proceedings, including any proceedings on appeal, shall be conducted on the record of the stipulation of facts relating to the complaint.

The 2018 diversion agreement on the DUI charge reflects that the Applicant stipulated that he operated a vehicle under the influence of alcohol, "as more specifically stated in the complaint filed in this case, and the evidence attached, if any, all of which are incorporated herein by reference as facts stipulated." The attached Stipulation of Facts document, signed by the Applicant, his defense counsel, and a diversion supervisor includes an arresting officer's report, as well as a statement reflecting that the Applicant "admits and stipulates that he . . .was operating or attempting to operate a vehicle while the alcohol concentration in his . . . blood or breath [was] .08 or more, to wit: .143, as measured within three hours of the time of operating or attempting to operate the vehicle."

The diversion agreement further provides that as part of the program the Applicant was required to complete an alcohol/drug facility evaluation and follow any recommendation; pay any and all costs of

the diversion program; contribute $50 to a non-profit organization; and complete 40 hours of community service work. The agreement also specifies that the Applicant was charged with DUI and "upon . . . having accepted responsibility for this act and after investigation of this offense" appeared eligible for diversion and "[o]n the authority of the prosecuting attorney, prosecution of this offense shall be deferred for a period of twelve (12) months from the date hereof, provided [he] abide[s] by the conditions and the requirements set forth in this Agreement." Lastly, the agreement provides that, should the Applicant violate any of those conditions during the diversionary period, the prosecuting attorney may ask the court "to reinstate this case on the trial docket for further prosecution."

As stated, the statutory definition of conviction includes deferred adjudications where an individual 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 the individual's liberty is imposed. Thus, if an individual admits sufficient facts to warrant a finding of guilt but the court defers adjudication of guilt 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 Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017) (holding that 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 court documents show that as a condition of his entry into the diversion program the Applicant admitted in the stipulation of facts that he was driving or attempting to drive under the influence of alcohol with concentration of .08 or more, as charged, and that he accepted responsibility for the DUI offense. The Applicants admission to having committed each element of the DUI offense, and his acceptance of responsibility supports a conclusion that the Applicant admitted sufficient facts to warrant a finding of guilt, as required to satisfy the first prong of the definition of "conviction," as it pertains to deferred adjudications. Furthermore, by requiring the Applicant to comply with the conditions specified in the diversion agreement, the court imposed punishment, penalty, or restraint on his liberty. *See e.g., Matter of Punu*, 22 I&N Dec. 224, 228 (BIA 1998) (finding that probation is a form of punishment or restraint on liberty required under section 101(a)(48)(A) of the Act).

The record as supplemented on appeal therefore indicates that the Applicant was convicted of the DUI offense for immigration purposes, even though the charge was ultimately dismissed after he successfully completed the diversion program. And because the offense was punishable by confinement in jail for a term of one year or less, the conviction is a misdemeanor for TPS purposes.

2. 2016 Charges

Nevertheless, the evidence remains insufficient to determine whether any of the 2016 misdemeanor charges resulted in convictions for immigration purposes as the Applicant still does not provide the previously requested diversion agreement (or agreements) concerning those charges.

The certified case summary report printout the Applicant submits on appeal shows, in part, that in [redacted] 2016 he entered into a diversion agreement, and that in [redacted] 2016 the domestic battery and other charges were dismissed with prejudice after the Applicant completed one-year diversion period. The

report further indicates that as part of the diversion agreement the Applicant was required to perform 30 hours of community service (of which he completed 25.61hours); pay diversion, law enforcement, family crisis, and crime stopper fees; and write an apology letter.

A person charged with domestic battery in violation of Kansas Statutes Annotated § 21-5414(a) may enter into a diversion agreement in lieu of further criminal proceedings. *See* Kan. Stat. Ann. §21-5414(g). Here, the record indicates that the Applicant did enter into such an agreement, and that he was required to fulfill certain conditions before the charges were dismissed. However, as he does not submit a copy of the diversion agreement, the record remains inadequate to show whether he admitted sufficient facts to warrant a finding of guilt and, thus, whether he was "convicted" of one or more misdemeanor offenses with which he was charged in 2016.

In view of the above, we conclude that the Applicant has not demonstrated that he was not convicted of two or more misdemeanor offenses, in addition to his DUI misdemeanor conviction.

III. CONCLUSION

The Applicant has not met his burden of proof to show that he has not been convicted of two or more misdemeanor offenses committed in the United States. As such, he has not established that he is not subject to the criminal grounds of ineligibility for TPS, and his application remains denied.

ORDER: The appeal is dismissed.