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Case No. 25-3987

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
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KELLY L. STEPHENS, Clerk

JOSE GENARO HERRERA, Petitioner, v. TODD BLANCHE, Attorney General, Respondent.	)	ON PETITION FOR REVIEW FROM THE UNITED STATES BOARD OF IMMIGRATION APPEALS O P I N I O N

Before: READLER, DAVIS, and BLOOMEKATZ, Circuit Judges.

DAVIS, Circuit Judge. Petitioner Jose Genaro Herrera seeks review of the Board of Immigration Appeals' ("BIA") order dismissing his appeal of an immigration judge's ("IJ") order of removal. Herrera does not contest his removability but instead challenges the decision to pretermit his application for temporary protected status ("TPS"). His petition lacks merit for two reasons. First, Herrera is statutorily ineligible for TPS because his two misdemeanor convictions in the United States remain in effect. That an ordinance he was convicted under has since been repealed does not change this. And second, Herrera has not shown that pretermitting his TPS application violated his due process rights, much less that a hearing on his eligibility would have changed the outcome of his case. Thus, we DENY the petition for review.

I.

TPS is a humanitarian benefit that prohibits the removal of nationals who hail from certain countries that have unsafe conditions. *See* 8 U.S.C. § 1254a(a)(1), (b)(1); *see also Mullin v. Doe*, 609 U.S. 324, 329–30 (2026). A country is designated unsafe at the Secretary of Homeland Security's discretion for a specified period between six and eighteen months which, upon a periodic review, is either extended or terminated based upon whether the country's conditions have changed. 8 U.S.C. § 1254a(b)(1)–(3); *see also id.* § 1103(a). Congress created TPS with a particular interest in protecting noncitizens fleeing from civil unrest in El Salvador, *see* Immigration Act of 1990, Pub. L. No. 101-649, § 303, 104 Stat. 4978, 5036–37 (1990), and the Secretary has maintained El Salvador as a designee since March 9, 2001, *see* Designation of El Salvador Under TPS Program, 66 Fed. Reg. 14214 (2001).

To control immigration, however, Congress has limited who may receive TPS. Eligibility turns on several requirements, such as the noncitizen's admissibility, continuous residence in the United States, continuous physical presence in the United States since their country's designation date, and timely registration for TPS during an announced registration period. 8 U.S.C. § 1254a(c)(1)(A)(i)–(iv). There are also a few disqualifiers. Relevant here, a registrant who has "been convicted of any felony or 2 or more misdemeanors committed in the United States" is ineligible for TPS. *Id.* § 1254a(c)(2)(B)(i). A misdemeanor is any crime that is punishable by a maximum imprisonment term of one year, "regardless of the term [the noncitizen] actually served," excluding crimes with a maximum punishment of five days or less. 8 C.F.R. § 244.1. To establish TPS eligibility, "the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements." *Id.* § 244.9(b).

II.

Herrera is a sixty-eight-year-old native and citizen of El Salvador and veteran of the Salvadoran Civil War. Shortly after the war, his mother and niece were murdered in El Salvador by gang members attempting to extort them. Herrera feared for his life and fled to the United States, entering without inspection in April 1996.

In July 1997, Herrera committed a criminal traffic offense in Columbus, Ohio. Specifically, police caught him driving with a temporary instruction permit and no licensed driver accompanying him, in violation of section 2135.02 of the Columbus City Code. The case information page for this offense shows that Herrera pleaded guilty, and the offense is designated as "M1" in the "Degree of Offense" box. (A.R. at 277). Sometime after this conviction, Herrera was removed from the United States.

Herrera re-entered the United States without inspection in October 2000 and was arrested and released on bond. In short order, the government initiated removal proceedings. Then, in May 2001, Herrera filed a TPS application after the Secretary designated El Salvador an unsafe country due to recent environmental disasters. And several months later, the IJ administratively closed Herrera's removal case in response to a joint request from the parties. Herrera's TPS application was ultimately denied in January 2002 after he failed to correct certain deficiencies. And his subsequent TPS applications in 2006 and 2010 were also denied. In 2012, the government requested that Herrera's removal proceedings be re-calendared.

Also in 2012, Herrera pleaded guilty to another criminal offense, this time in Whitehall, Ohio. Like the 1997 conviction, Herrera's 2012 conviction was for driving as a temporary instruction permit holder without a licensed driver accompanying him. Likewise, the case management report for the 2012 offense shows "BOND M1" in the "Penalty" box. (A.R. at 290).

Following this conviction, the IJ granted the government's request to re-calendar and set a master hearing for removal that was ultimately continued to April 2021.

In 2020, seven years into his removal proceedings, Herrera requested review of his original 2001 TPS application, and the IJ set a briefing schedule. The government agreed to the review and asked Herrera to file an updated application. Herrera filed the updated application, along with a cursory argument for TPS relief. He argued only that his misdemeanors "are not [] 'misdemeanors' for purposes of adjudicating" his application and attached as an exhibit a January 21, 2011, United States Customs and Immigration Services ("USCIS") memorandum directed to adjudicators of TPS applications and administrative appeals. (A.R. at 422).

The USCIS memorandum explains that a misdemeanor conviction entered under a Florida "no jail" or "no incarceration" certification "does not meet the definition of a misdemeanor under 8 C.F.R. § 244.1 because it would not constitute an offense punishable by imprisonment." (A.R. at 424). The memorandum suggested that the same may hold true for cases from other states that utilize similar procedures, depending on the particulars of the certification and relevant laws. Herrera indicated he would provide "[a]ny further clarification" concerning this argument at his "individual hearing." (A.R. at 422).

But before any hearing was scheduled, the government moved to pretermit Herrera's application based on ineligibility due to his 1997 and 2012 misdemeanors. Herrera filed no opposition, (*see* Respondent's Br., ECF 15, 8), and the IJ pretermitted his application. The IJ found that Herrera's two misdemeanors were disqualifying because they were "each punishable by more than five days in custody" and that Herrera's reliance on the USCIS memorandum was "misplaced" because his convictions did not involve a "no jail" or "no incarceration" certification. (A.R. at 410). Herrera was then ordered removed on April 2, 2021.

Herrera appealed to the BIA. He argued pretermission was improper because the ordinance under which he was convicted was repealed in 2004,[1] meaning he "no longer has any misdemeanor convictions." (A.R. at 21). Herrera also argued that the IJ "should have held a hearing on the matter to allow [him] to present evidence and testimony regarding this issue." (A.R. at 22). The BIA dismissed Herrera's appeal, holding that his misdemeanor convictions were final and disqualified him from TPS.

Herrera timely petitioned for review.

III.

Jurisdiction. We have jurisdiction to review final orders of removal. 8 U.S.C. § 1252(a)(1). And under Congress's "zipper clause," this jurisdiction extends to "all questions of law and fact . . . arising from any" removal proceeding. *Id.* § 1252(b)(9); *see also Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 230 (2020). Where such questions concern a "decision or action" subject to the "discretion of the Attorney General or the Secretary of Homeland Security," our review is limited to "constitutional claims or questions of law." 8 U.S.C. § 1252(a)(2)(B)(ii), (D). Herrera's petition challenges the IJ's TPS eligibility determination, which is "non-discretionary" and thus "subject to judicial review." *Hosseini v. Johnson*, 826 F.3d 354, 359 (6th Cir. 2016); *see also Bouarfa v. Sec'y, Dep't of Homeland Sec.*, 75 F.4th 1157, 1163 (11th Cir. 2023) (holding TPS eligibility determinations are non-discretionary), *aff'd on other grounds sub nom. Bouarfa v. Mayorkas*, 604 U.S. 6 (2024).

Standard of Review. Where the BIA "issues a separate opinion" rather than a summary affirmance of the IJ's decision, "we review the BIA's decision as the final agency determination."

[1] The BIA credited the government's assertion that Section 2135.02 was repealed in 2003, but the repeal did not take effect until January 1, 2004. *See* Columbus, Ohio, Ordinance 2120-2003 (effective Jan. 1, 2004). Relying on the effective date, however, we reference 2004 as the year the ordinance was repealed.

Mazariegos-Rodas v. Garland, 122 F.4th 655, 663 (6th Cir. 2024) (citation modified). We also review the IJ's decision to the extent the BIA adopted that judge's reasoning. *Id.* Our review of legal determinations is de novo. *Id.* at 664.

IV.

Herrera's petition for review is twofold. First, he contends that his convictions do not disqualify him from TPS because (1) the ordinance under which he was convicted in 1997 has since been repealed, and (2) substantial evidence does not support a finding that his 2012 conviction was for a first-degree misdemeanor. Second, he argues that disposing of his TPS application without a hearing violated his due process rights because such a hearing would have allowed him to supplement the record and meet his burden to show TPS eligibility. We address these arguments in turn, and they each fail.

A.

TPS Eligibility. Start with 1997. Herrera does not dispute that his 1997 conviction was for "a misdemeanor of the first degree." (Petitioner's Br., ECF 12, 9). Instead, he asserts that the 1997 conviction is not disqualifying because the ordinance of conviction was repealed. *See* COLUMBUS, OH., CODE OF ORDINANCES § 2135.02 (repealed Jan. 1, 2004). This repeal, says Herrera, altered his conviction "for TPS purposes" and should have triggered the 2011 USCIS memorandum's "no jail" certification exception. (Petitioner's Br., ECF 12, 16). We disagree.

In determining the effect of an ordinance's repeal on later proceedings, its savings clause is typically the best guide. *See Flanigan v. Sierra County*, 196 U.S. 553, 560 (1905); *see also City of Columbus v. Asomani*, 85 N.E.3d 1159, 1167 (Ohio Ct. App. 2017). Under the general savings clause for Columbus's ordinances, the "repeal of an ordinance shall not affect any punishment or penalty incurred before the repeal took effect." COLUMBUS, OH., CODE OF ORDINANCES § 101.05.

Columbus's clause coheres with Ohio statutory law, which provides that the "repeal of a statute does not . . . [a]ffect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the . . . repeal," OHIO REV. CODE § 1.58(A)(3), and is binding for purposes of this appeal, *see* OHIO CONST. art. XVIII, § 3. So Herrera's 1997 misdemeanor conviction stands since it predates by years Section 2135.02's repeal. And he does not demonstrate that the TPS eligibility requirement would treat the conviction of a later-repealed crime any differently.

The USCIS's policy memorandum does not change this outcome. Indeed, it is inapposite, given that the "no jail" certification under scrutiny in that memorandum, by design, had to be entered *before* a conviction. *See* Fla. R. Crim. P. 3.994. Such a certification, therefore, would entirely "remov[e] the possibility of incarceration" for the charged offense. (A.R. at 424). The repeal of Section 2135.02, as explained, had no such effect. Because Herrera had already been convicted and sentenced under the ordinance's full range of available penalties by the time the repeal occurred, the situations are not analogous. *Cf. McNeill v. United States*, 563 U.S. 816, 823 (2011) ("It cannot be correct that subsequent changes in state law can [always] erase an earlier conviction . . . ."). In other words, the repeal did not—indeed, could not—affect Herrera's possibility of incarceration.

On to 2012. As regards this conviction, Herrera argues that the Whitehall offense was not a first-degree misdemeanor and thus falls outside the scope of 8 C.F.R. § 244.1. (Petitioner's Br., ECF 12, 10–14). He contends that the record before the IJ was insufficient to conclude otherwise, and in doing so challenges the IJ's factual finding. *See Pereida v. Wilkinson*, 592 U.S. 224, 238 (2021) ("[T]o ask what crime the defendant was convicted of committing is to ask a question of fact."). Thus, we would ordinarily consider whether "substantial evidence" supports that conclusion. *Vasquez-Rivera v. Garland*, 96 F.4th 903, 907 (6th Cir. 2024). But Herrera did not

raise this argument before the BIA, instead arguing only that he "no longer has any misdemeanor convictions" because of the Columbus ordinance's repeal.[2] (A.R. at 21). *See Cuevas-Nuno v. Barr*, 969 F.3d 331, 334 (6th Cir. 2020) ("We look to the [noncitizen's] brief before the BIA to determine which claims the [noncitizen] adequately raised before that body."), *abrogated on other grounds*, *Santos-Zacaria v. Garland*, 598 U.S. 411, 416 (2023). Because the government has invoked Section 1252(d)(1)'s exhaustion rule, we cannot consider that unpreserved argument. *See* 8 U.S.C. § 1252(d)(1); *Morris v. Blanche*, 179 F.4th 489, 496 (6th Cir. 2026) (holding that Section 1252(d)(1) is "mandatory in the sense that a court must enforce the rule if a party properly raises it" (citation modified)).

In sum, neither the BIA nor the IJ erred in concluding that Herrera's two misdemeanor convictions disqualify him from TPS protection.

B.

Due Process. The last issue is whether not holding a hearing on TPS eligibility violated Herrera's due process rights. The answer is no.[3] A removal proceeding violates due process only where the noncitizen was substantially prejudiced by an error in the proceeding. *Lin v. Holder*, 565 F.3d 971, 979 (6th Cir. 2009). The proceeding must have been "so fundamentally unfair that

[2] Herrera also broadly stated that the Columbus ordinance did not "meet the definition of a misdemeanor under 8 C.F.R § 244.1." (A.R. 21). Yet he did not specify how or why the ordinance failed the definition or otherwise develop this argument beyond his contention that the ordinance was repealed. So if he intended to challenge the definitional match on some ground other than the repeal, he forfeited it by raising this argument in such "a perfunctory manner, unaccompanied by some effort at developed argumentation." *Porter v. Bondi*, 127 F.4th 993, 999 (6th Cir. 2025) (citation modified).

[3] Like the petitioner in *Mazariegos-Rodas*, Herrera did not "cit[e] to relevant caselaw or even [] mention [] the words 'due process'" in his brief before the BIA. 122 F.4th at 665. It is thus questionable whether he exhausted his due process claim. *See id.*; *see also Tomaszczuk v. Whitaker*, 909 F.3d 159, 167 (6th Cir. 2018) (classifying claims "alleging errors related to the consideration of evidence" as a type of "correctable procedural error[] . . . subject to [] statutory exhaustion"). Because Respondent has not "properly raise[d]" this claim-processing rule, however, *Mazariegos-Rodas*, 122 F.4th at 664 (citation modified), we will address the merits of Herrera's argument.

the [noncitizen] was prevented from reasonably presenting his case." *Deh v. Blanche*, 174 F.4th 503, 508 (6th Cir. 2026) (citation modified).

Herrera's due process claim falters because he has not shown a defect in his proceedings. IJs "are not required to hold merit hearings on applications that are incomplete or where an applicant is ineligible for relief and may pretermit those applications." *Matter of H-A-A-V-*, 29 I. & N. Dec. 233, 235 (BIA 2025). Herrera failed to oppose the motion to pretermit, and during the removal proceedings, he did not contest the degree of his misdemeanor convictions. (*See* Respondent's Br., ECF 15, 8). He argued only that he no longer had *any* convictions because of the Columbus ordinance repeal, and the IJ rejected this argument. Thus, it was not error for the IJ to find a hearing unnecessary. *See Jashari v. Sessions*, 722 F. App'x 481, 495 (6th Cir. 2018) (concluding there was no defect where the IJ's findings were correct).

Moreover, there was no prejudice. A noncitizen is prejudiced only if "the due process violation[] led to a substantially different outcome from that which would have occurred in the absence of th[at] violation[]." *Bi Qing Zheng v. Lynch*, 819 F.3d 287, 297 (6th Cir. 2016) (citation modified). Here, two misdemeanor convictions with "M1" designations undisputably appear on Herrera's criminal record, and as discussed above, his explanation for why the 1997 conviction does not disqualify him from TPS fails. As for the 2012 conviction, the suspended sentence he received comports with a finding of a first-degree misdemeanor and not a lesser offense. *See* WHITEHALL, OH., CODE OF ORDINANCES § 303.99(b) (stating the maximum term of imprisonment for a minor misdemeanor is no imprisonment). It is thus unclear how a hearing would have meaningfully altered Herrera's proceedings, and Herrera himself seems unsure whether the evidence purportedly missing from the record is even available. (*See* Petitioner's Br., ECF 12, 17–18). This speculation that unobtained evidence might help him is not enough to show a hearing

would have "affected the outcome of [his removal] proceeding." *Deh*, 174 F.4th at 508 (citation modified); *see also Bi Qing Zheng*, 819 F.3d at 298 ("[T]he fact remains that [the petitioner] has failed to show that access to further information would have led to a substantially different outcome.").

V.

For these reasons, the petition is DENIED.