

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of February, two thousand twenty.

PRESENT: DENNIS JACOBS,
GUIDO CALABRESI,
DENNY CHIN,
Circuit Judges.

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PELEGE BREVIL,
Petitioner,

-v-

16-4149-ag

WILLIAM P. BARR, UNITED STATES
ATTORNEY GENERAL,
Respondent.

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FOR PETITIONER:

Ryan C. Brewer, The Bronx Defenders, Bronx,
New York.

FOR RESPONDENT:

Joseph H. Hunt, Assistant Attorney General;
Anthony P. Nicastro, Assistant Director, Office
of Immigration Litigation; Dana M. Camilleri,
Trial Attorney, Office of Immigration
Litigation, Civil Division, United States
Department of Justice, Washington, D.C.

UPON DUE CONSIDERATION of this petition for review of a decision
of the Board of Immigration Appeals ("BIA"), it is hereby **ORDERED, ADJUDGED,**
and **DECREED** that the petition for review is **DENIED**.

Petitioner Pelege Brevil, a native and citizen of Haiti, seeks review of an
October 28, 2016, decision of the BIA, affirming the May 16, 2016, decision of an
Immigration Judge ("IJ") ordering him removed and denying temporary protected
status ("TPS"). *In re Pelege Brevil*, A200 465 552 (B.I.A. Oct. 28, 2016), *aff'g* No. A200 465
552 (Immig. Ct. N.Y. City May 16, 2016). We assume the parties' familiarity with the
underlying facts, procedural history, and issues on appeal.

Under the circumstances of this case, we have considered both the IJ's and
the BIA's opinions "for the sake of completeness." *Wangchuck v. Dep't of Homeland Sec.*,
448 F.3d 524, 528 (2d Cir. 2006). The applicable standards of review are well
established. 8 U.S.C. § 1252(b)(4)(B); *Yanqin Weng v. Holder*, 562 F.3d 510, 513 (2d Cir.
2009). Given the Government's concession before the agency that Brevil was statutorily
eligible for TPS and the agency's apparent assumption of eligibility, the only issue

properly before us is the agency's discretionary denial of TPS. *See Lin Zhong v. U.S. Dep't of Justice*, 480 F.3d 104, 122 (2d Cir. 2007) ("[W]e may consider only those issues that formed the basis for [the agency's] decision.").

Brevil argues that the agency erred in denying TPS as a matter of discretion without first articulating a legal standard for making such decisions. The Government argues that we lack jurisdiction to consider this argument because Brevil did not exhaust it before the BIA. The issue did not arise, however, until the BIA denied TPS as a matter of discretion without articulating a legal standard for granting TPS and applied a standard that differed from the one relied on by the IJ. *See Pierre v. Holder*, 588 F.3d 767, 777 & n.4 (2d Cir. 2009). Hence, the exhaustion argument does not apply. Moreover, while the agency argues that we lack jurisdiction to review the discretionary denial of a TPS application, *see* 8 U.S.C. § 1252(a)(2)(B)(ii), we retain jurisdiction to review constitutional claims and "questions of law," 8 U.S.C. § 1252(a)(2)(D).

Assuming without deciding that Brevil raises a question of law, we conclude that remand is not required. We agree with Brevil that the agency denied him TPS as a matter of discretion without establishing a clear legal standard, *see In re Mendez-Moralez*, 21 I. & N. Dec. 296, 300 (BIA 1996) ("[I]t is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion."). The BIA has since established a standard for evaluating

discretionary TPS. Nonetheless, remand is not required because the agency here weighed many of the factors identified as relevant in that standard, taking into account both the positive and negative equities established in the record. *Matter of D-A-C-*, 27 I. & N. Dec. 575, 577-78 (BIA 2019). Finally, even assuming that the IJ erred in applying the correct standard, remand is unnecessary here because we are confident that the agency will reject Brevil's TPS application even under the newly-articulated standard, in light of his conviction for sexual misconduct with a minor, *i.e.*, a thirteen-year old girl, and his lack of remorse. *See Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 339 (2d Cir. 2006) (holding that remand is futile when this Court can "confidently predict" that the agency would reach the same decision absent any errors).

For the foregoing reasons, the petition for review is **DENIED**. All pending motions and applications are **DENIED** and stays **VACATED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk