



U.S. Citizenship
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Services

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FILE: [REDACTED] OFFICE: CALIFORNIA SERVICE CENTER DATE: DEC 13 2005
[WAC 99 144 52839]

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration
and Nationality Act, 8 U.S.C. § 1254

ON BEHALF OF APPLICANT:
[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.


for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further action.

The applicant is a native and citizen of Honduras who is seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The District Director, Los Angeles, California, denied the application on February 21, 2001, after determining that the applicant was inadmissible to the United States, pursuant to section 212(a)(2)(A)(i)(II) of the Act, based on his conviction of the felony offense of H&S 11359, possession for sale of marijuana, on May 18, 1990, in the County of Los Angeles, California.

In a motion to reopen or reconsider, the official having jurisdiction is the official who made the latest decision in the proceeding. 8 C.F.R. § 103.5(a)(1)(ii).

The record shows that on September 24, 2003, counsel filed a Motion to Reconsider the district director's decision. He submitted a copy of the order of the court dated February 26, 2001, withdrawing the applicant's guilty plea and entering a plea of not guilty, and vacating judgment of conviction pursuant to Penal Code section 1016.5. Counsel stated that according to PC 1016.5, failure to warn a non-citizen, prior to entry of a plea of guilty or no contest, that the conviction may cause deportation, exclusion, and denial of naturalization requires automatic vacating of the conviction. A dismissal pursuant to PC 1016.5 is not an expungement of a conviction.

The California Service Center dismissed the motion on April 14, 2004, because it was not filed within 30 days of the district director's denial as provided in 8 C.F.R. §103.5(a).

On May 11, 2004, counsel appeals the director's decision to deny the motion. The director accepted the applicant's appeal and forwarded the file to the AAO. However, the record in this case does not show that the AAO had rendered a decision on an appeal of the district director's initial decision. In fact, the initial decision by the district director was not appealed by the applicant. The AAO has no jurisdiction over an appeal filed on any subsequent motion. Therefore, the case will be remanded to the director.

A review of the record of proceeding reflects that subsequent to the district director's initial decision dated February 21, 2001, the applicant's former counsel filed a motion to reconsider on April 30, 2001, because the applicant's conviction was dismissed on February 26, 2001, pursuant to PC 1016.5. The record does not indicate that any action was taken regarding this motion by the district director.

As always in these proceedings, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The case is remanded to the director for further action consistent with the above and entry of a decision.