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M

[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: **NOV 02 2005**

[WAC 99 190 52856]

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.

*Robert P. Wiemann*

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 on appeal. The director's decision will be withdrawn, and the appeal will be sustained.

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 director determined that the applicant was ineligible for TPS because he had been convicted of a felony committed in the United States, and because he was inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act based on his drug offense conviction. The director, therefore, denied the application.

On appeal, counsel submits a brief and additional evidence.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an alien who is a national of a foreign state designated by the Attorney General is eligible for temporary protected status only if such alien establishes that he or she:

- (a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign state designated under section 244(b) of the Act;
- (b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;
- (c) Has continuously resided in the United States since such date as the Attorney General may designate;
- (d) Is admissible as an immigrant except as provided under § 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f)
  - (1) Registers for TPS during the initial registration period announced by public notice in the *Federal Register*, or
  - (2) During any subsequent extension of such designation if at the time of the initial registration period:
    - (i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;
    - (ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;
    - (iii) The applicant is a parolee or has a pending request for reparole; or

- (iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.
- (g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of condition described in paragraph (f)(2) of this section.

The term *continuously resided*, as defined in 8 C.F.R. § 244.1, means residing in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual, and innocent absence as defined within this section or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

The term *continuously physically present*, as defined in 8 C.F.R. § 244.1, means actual physical presence in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences as defined within this section.

Persons applying for TPS offered to Hondurans must demonstrate that they have continuously resided in the United States since December 30, 1998, and that they have been continuously physically present since January 5, 1999. On May 11, 2000, the Attorney General announced an extension of the TPS designation until July 5, 2001. Subsequent extensions of the TPS designation have been granted with the latest extension valid until July 5, 2006, upon the applicant's re-registration during the requisite time period.

An alien shall not be eligible for temporary protected status under this section if the Secretary of the Department of Homeland Security finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

8 C.F.R. § 244.1 defines "felony" and "misdemeanor:"

*Felony* means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except: When the offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less regardless of the term such alien actually served. Under this exception for purposes of section 244 of the Act, the crime shall be treated as a misdemeanor.

*Misdemeanor* means a crime committed in the United States, either

- (1) Punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or
- (2) A crime treated as a misdemeanor under the term "felony" of this section.

For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC 802). Section 212(a)(2)(A)(i)(II) of the Act.

The record shows that on November 23, 1994, in the Municipal Court of the Long Beach Courthouse Judicial District, County of Los Angeles, California, Case No. [REDACTED] the applicant was indicted for Count 1, possession of a narcotic controlled substance, in violation of Health and Safety Code (H&S) 11350(a), a felony; and Count 2, carrying a concealed weapon within a vehicle, in violation of Penal Code (PC) 12025(a)(1), a misdemeanor. On January 11, 1995, the applicant was convicted of Count 2, and placed on probation for a period of one year, with the condition that he serve 2 days in the county jail. As to Count 1, the applicant was granted drug diversion in accordance with 1000 PC.

Citing *Matter of Grullon*, 20 I&N Dec. 12 (BIA 1989), counsel, on appeal, states that completing a pre-trial diversion program, and obtaining dismissal of the charges, does not constitute a conviction under immigration law as long as there has been no plea of guilty or a no contest plea entered at any time. Counsel asserts that the applicant never pled guilty or *nolo contendere*, completed a pre-trial diversion program, and obtained dismissal of the possession of a controlled substance charge. Counsel states that, therefore, the diversion and subsequent dismissal of the charge does not constitute a conviction under immigration law, and does not make the applicant inadmissible.

Pursuant to section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101((a)(48)(A), the term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where --

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Under the pretrial diversion program, a defendant is not required to enter a plea or to admit any facts sufficient to warrant a finding of guilty. The record indicates that the applicant did not enter a plea of guilty or *nolo contendere*, nor did the judge find the applicant guilty of the offense detailed in Count 1 above. On November 13, 1995, diversion was terminated and Count 1 was dismissed by the court. The applicant, in this case, was not convicted of the felony drug offense within the meaning of section 101(a)(48)(A) of the Act. Therefore, he is not inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act. Accordingly, this finding of the director will be withdrawn.

The director also noted that the applicant "failed to disclose in part four, section two, of the application, that statements '2a' and '2d' may be applicable to the applicant." These statements ask whether the applicant has been convicted of any felony or two or more misdemeanors committed in the United States, and whether he has been arrested, cited, charged, indicted, fined, or imprisoned. The applicant wrote "NO" in response to these questions. Concealing any conviction(s) may render the applicant inadmissible to the United States pursuant to section 212(a)(6)(C) of the Act.

*Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960, AG 1961), is instructive and states that a misrepresentation under section 212(a)(19) of the Act [now section 212(a)(6)(C) of the Act] is material if either (a) the alien is

excludable on the true facts, or (b) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he or she be excluded.

The applicant, in this case, does not meet the materiality test as set forth in *Matter of S-and B-C-*. There are insufficient grounds to render the applicant inadmissible on the true facts. The applicant was not convicted of the drug offense (Count 1), and that the applicant's one misdemeanor conviction of carrying a concealed weapon (Count 2) does not render the applicant ineligible for TPS under Section 244(c)(2)(B)(i) of the Act. Therefore, it cannot be concluded that there is a misrepresentation of a material fact according to the test set forth in *Matter of S- and B-C-, supra*.

The record shows that the applicant was convicted of only one misdemeanor offense. As the applicant is not ineligible for TPS based on this conviction, pursuant to section 244(c)(2)(B)(i) of the Act, this finding of the director will be withdrawn.

The applicant has furnished sufficient evidence to establish that he has continuously resided in the United States since December 30, 1998, and has been continuously physically present since January 5, 1999, as described in 8 C.F.R. §§ 244.2(b) and (c).

Accordingly, the director's decision will be withdrawn, and the application will be approved.

An alien applying for temporary protected status has the burden of proving that he or she meets the requirements enumerated above and is otherwise eligible under the provisions of section 244 of the Act. The applicant has met this burden.

**ORDER:** The appeal is sustained and the application is approved.