

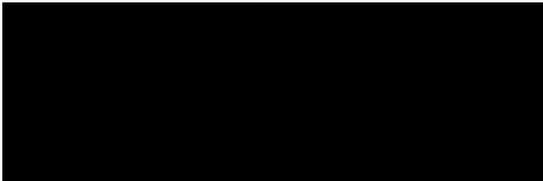
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



M1

FILE:

[WAC 99 187 52843]

Office: SAN DIEGO

Date:

AUG 18 2006

IN RE:

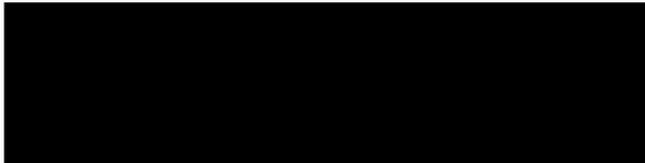
Applicant:



APPLICATION:

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

ON BEHALF OF APPLICANT:



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.

Cindy N. Gomez for
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, San Diego, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant claims to be 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 denied the application because he found the applicant had been convicted of a felony.

On appeal, counsel for the applicant 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 applicant who is a national of a foreign state is eligible for TPS only if such alien establishes that he or she:

- (a) Is a national of a 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 section 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f)
 - (1) Registers for Temporary Protected Status 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.

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. See 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 reveals that the applicant was arrested in San Diego, California, on June 3, 1993, and charged with: (1) one count of selling or furnishing a controlled narcotic substance, specifically cocaine base, in violation of section 11352(a) H&S, and one count of selling a controlled substance, specifically cocaine base, within the meaning of section 1203.073(b)(7) PC, in violation of section 11352(a) H&S; (2) one count of transportation of a controlled substance in violation of section 11352(a) H&S; (3) one count of possession for sale of cocaine base in violation of section 11351.5 H&S; and, (4) one count of possession of a controlled substance in violation of section 11350(a) H&S. On March 14, 1994, the applicant pled guilty in the Municipal Court of California, County of San Diego, State of California, to count (1), ~~selling or furnishing a controlled substance in violation of section 11352(a) H&S, a felony.~~ (Case No. [REDACTED] In light of his plea, the other charges were dismissed at that time.

The director denied the application on January 9, 2003, because he found the applicant had been convicted of a felony.

On appeal, counsel for the applicant states that the applicant is no longer ineligible for TPS based on his criminal record because his felony conviction was expunged in the Superior Court of California, County of San Diego. Counsel submits a document from the Superior Court of California, San Diego County, indicating that the applicant's guilty plea on the felony offense detailed above was expunged on March 25, 2003, in accordance with sections 1203.4 and 1203.4(a) PC of the California Penal Code.

However, Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under state law. State rehabilitative actions which do not vacate a conviction on the merits are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan*, I.D. 3377 (BIA 1999). Further, the applicant pled guilty to the felony charge. Therefore, despite the expungement, the applicant remains convicted of this offense for immigration purposes.

The applicant is ineligible for TPS due to his record of one felony conviction, detailed above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the application for this reason will be affirmed.

As stated above, on March 14, 1994, the applicant pled guilty in the Municipal Court of California, County of San Diego, State of California, to count (1), selling or furnishing a controlled substance in violation of section 11352(a) H&S, a felony. (Case No. [REDACTED]) In his plea document, the applicant admitted:

"I took part in selling cocaine base drugs to an undercover policeman."

An alien is inadmissible if a consular officer or immigration officer knows or has reason to believe he is or has been an illicit trafficker in any such controlled substance. Section 212(a)(2)(C) of the Act. Therefore, the application is denied for this additional reason.

The record reflects that a decision in removal proceedings based upon the applicant's request for "Continuance of hearing; termination of proceedings; voluntary departure in conclusion of hearing under Section 240(b), I&N Act" was issued by an Immigration Judge (IJ) in San Diego, California on July 20, 2005. In his decision, the IJ found that the applicant's motion to terminate must be denied because the applicant had suffered a 1994 controlled substance conviction. Namely, the record contained the conviction document, which reveals that, on February 25, 2004, the respondent did unlawfully sell, furnish, administer, and give away, and offer to sell, furnish, administer, and give away a controlled substance, namely, cocaine base, in violation of Section 11352(a) of the California Health and Safety Code. The IJ determined that this conviction could not be set aside within the meaning of the I&N Act even though the Superior Court issued an order of expungement under Section 1203.4 and 1203.4a of the California Penal Code, setting aside the conviction for all purposes except that the respondent must disclose the conviction at any further inquiry.

An appeal to the IJ's July 20, 2005, determination was dismissed by the Board of Immigration Appeals of the Executive Office for Immigration Review in Falls Church, Virginia, on August 1, 2006. In that determination, the Board found:

The respondent's conviction remains a conviction for immigration purposes despite its expungement under Cal. Penal Code § 1203.4. *Matter of Marroquin*, 23 I&N Dec. 705 (A.G. 2005). Additionally, the decision by the United States Court of Appeals for the Ninth Circuit in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), that "persons whose offenses would qualify for treatment under the First Offender Act but who are convicted and have their convictions expunged under state laws may not be removed on account of those offenses: is inapplicable because the respondent's conviction under Cal. Health & Safety Code § 11352(a) was for the sale of cocaine base, not simple possession. 222 F.3d at 732. The First Offender Act, 18 U.S.C. § 3607, applies only to simple possession convictions, not to the sale, furnishing, administering, or giving away of a controlled substance. *Cf.* Cal. Health & Safety Code § 11352(a). Accordingly, the appeal is dismissed.

While the issue of the applicant's inadmissibility was not raised by the director, the applicant is also ineligible for TPS due to his inadmissibility under sections 212(a)(2)(A)(i)(II) of the Act. There is no waiver available for inadmissibility under this section of the Act.

Furthermore, the applicant has also failed to submit sufficient evidence to establish continuous residence in the United States since December 30, 1998, and continuous residence in the United States since January 5, 1999. Therefore, the application must also be denied for these additional reasons.

Beyond the decision of the director, it also is noted that the applicant has provided insufficient evidence to establish that he is a national or citizen of Honduras. The applicant has provided a copy of a birth certificate along with an English translation. However, a birth certificate alone does not establish nationality. The record does not contain any photo identification such as a passport or national identity document. 8 C.F.R. § 244.2(a)(1). Therefore, the application is denied for this additional reason.

It is noted that the applicant was previously deported from the United States on June 17, 1994.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 failed to meet this burden.

ORDER: The appeal is dismissed.