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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



OFFICE: VERMONT SERVICE CENTER

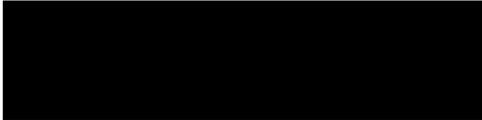
DATE: AUG 13 2007

consolidated herein]

[EAC 01 207 54243]

IN RE:

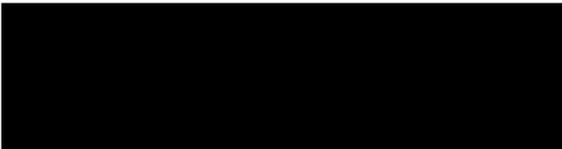
Applicant:



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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center (VSC). A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The applicant appealed the decision of the AAO. A motion to reopen, rather than an appeal, is the proper forum in this case, pursuant to 8 C.F.R. § 103.5(a)(1)(i). The appeal, therefore, will be treated as a motion to reopen. The motion will be dismissed, and the previous decision of the AAO will be affirmed.

The applicant is a native and citizen of El Salvador 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 on February 15, 2005, after determining that the applicant was ineligible for TPS because he was inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act due to a drug-related conviction.

The applicant appealed the director's decision to the AAO on March 9, 2005. The AAO reviewed the record of proceeding and concurred with the director's conclusion that the applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act based on the applicant's felony conviction on August 17, 1988, of Unlawful Possession with Intent to Deliver a Controlled Substance (Heroin). The AAO also noted that the applicant is also ineligible for TPS due to his felony drug conviction, and dismissed the appeal on August 1, 2006.

Pursuant to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be proved at the reopened proceedings and be supported by affidavits or other documentary evidence. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

On motion to reopen, counsel asserts that the applicant's TPS application was improperly denied by the VSC director, and that the AAO erred in finding that the applicant did not meet the requirement of section 244 of the Act, because the applicant's criminal charge was dismissed by the Criminal Court, Dallas, Texas, on January 21, 2004. He resubmits a copy of an "order dismissing proceedings and granting discharge from community supervision following deferred adjudication unsatisfactorily" signed by the Judge of the Criminal District Court, Dallas County, Texas, on January 21, 2004.

It is noted that the applicant had previously furnished a copy of the order dismissing the applicant's criminal proceedings on January 21, 2004, more than 15 years after the applicant's felony drug conviction. As determined by the AAO, although the court deferred adjudication of guilt on the 1988 charge of Unlawful Possession with Intent to Deliver a Controlled Substance (Heroin), the applicant entered a plea of guilty or *nolo contendere* to the charge, and the judge ordered some form of punishment, penalty, or restraint on the applicant's liberty. Therefore, the applicant has been convicted within the meaning of section 101(a)(48)(A) of the Act. Additionally, despite the dismissal of the felony conviction, the Board of Immigration Appeals, in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), held that under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Therefore, the applicant remains convicted, for immigration purposes, of the felony offense despite the dismissal or expungement of the conviction. In addition, the applicant is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act.

Accordingly, the motion will be dismissed, and the previous decision of the AAO will be affirmed.

It is noted for the record that during the pendency of Form I-290B, Notice of Appeal to the Administrative Appeals Office, filed on March 9, 2005, relating to the initial TPS application, the applicant filed a TPS re-registration application on May 4, 2005, under receipt number WAC 05 216 73121. The Director, California Service Center (CSC), denied the re-registration application on October 1, 2005, and the applicant appealed that decision of the CSC director on November 25, 2005. On January 9, 2006, the CSC director rejected the appeal because the appeal was untimely filed, and the appeal did not meet the requirements of a motion to reopen or reconsider pursuant to 8 C.F.R. § 103.5(a)(2) and (3). Subsequently, the AAO adjudicated and denied the initial TPS application on August 1, 2006 [EAC 01 207 54243], and the applicant also filed the current motion to reopen. A remand of this case to the director based on a premature denial of the re-registration application would not overcome the denial of the applicant's initial TPS application, nor the re-registration application, because the applicant remains ineligible for TPS based on his felony conviction and because he is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act.

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 motion is dismissed. The decision of the AAO dated August 1, 2006, is affirmed.