



U.S. Citizenship
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Services

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FILE:

OFFICE: CALIFORNIA SERVICE CENTER

DATE:

DEC 28 2007

[WAC 05 084 71669]

[WAC 99 118 52412]

IN RE:

Applicant:

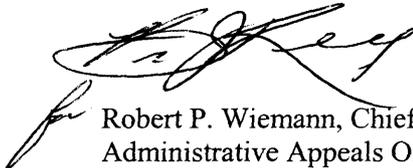
APPLICATION:

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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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 record indicates that the applicant filed a TPS application during the initial registration period on February 11, 1998, under receipt number WAC 99 118 52412. That application was approved on February 7, 2000.

The applicant filed the current Form I-821, Application for Temporary Protected Status, on December 23, 2004, and indicated that he was re-registering for TPS. The director denied the re-registration application on March 16, 2005, because the applicant had been convicted of a felony committed in the United States.

On January 26, 2005, the applicant filed an appeal from the denial decision. Since the appeal was filed more than 30 days after the date of the denial decision, it was not timely filed. Pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1), an appeal that is not filed within the time allowed must be rejected as improperly filed. However, the director should have withdrawn the applicant's TPS status rather than deny the re-registration application. Therefore, the case will be fully adjudicated. Pursuant to section 244(c)(3)(A) of the Act and 8 C.F.R. § 244.14(a)(1), the director may withdraw the status of an alien granted TPS at any time if it is found that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. Accordingly, the decision of the director to deny the application for re-registration will be withdrawn, the case will be treated as a withdrawal, and a decision will be made based on withdrawal of the applicant's temporary protected status.

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 a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act.

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.

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.

The record reveals the following offenses:

- (1) The Federal Bureau of Investigation (FBI) fingerprint results report indicates that on October 20, 1992, the applicant (under the name of [REDACTED] was arrested by the Los Angeles, California, Police Department and charged with transporting or selling a narcotic controlled substance, in violation of section 11352(a) H&S, a felony. The FBI report indicates that the applicant was "petitioned and detained." However, the actual final court disposition of this arrest is not contained in the record of proceeding.
- (2) On July 9, 1999, in the Municipal Court of Criminal Justice Center (LAC) Judicial, County of Los Angeles, California, Case No. [REDACTED] (arrest date July 7, 1999), the applicant was indicted for Count 1, perjury, in violation of § 118 PC, a felony; Count 2, forgery, in violation of § 470(d) PC, a felony; Count 3, possession of forged item, in violation of § 475(a) PC, a felony; and Count 4, burglary, in violation of § 459 PC, a felony. On July 29, 1999, the applicant entered a plea of guilty as to Count 2. Imposition of sentence was suspended and the applicant was placed on formal probation for a period of 3 years, sentenced to 24 days in the county jail with credit for time served, and ordered to pay \$200 in restitution fine. Counts 1, 3, and 4 were dismissed.

On May 11, 2001, the applicant was found to be in violation of probation when he was arrested in Los Angeles, California, on May 23, 2001, on the charge of inflicting corporal injury on a spouse or cohabitant, in violation of section 273.5(a) PC [No. (3) below]. In lieu of filing a separate charge against the applicant in connection with this arrest, his probation on the felony conviction, detailed above, was revoked and reinstated with the following modification: The applicant was ordered to attend domestic violence counseling, one session per week, one and one-half hours per session for one year, and to submit proof of enrollment on June 18, 2001. He was also ordered to enroll and complete a 52-week domestic violence course.

On January 17, 2002, the applicant's probation was terminated. The felony charge was reduced to a misdemeanor, his guilty plea, verdict, or finding of guilt was set aside and vacated and a plea of not guilty was entered, and the charge (Count 2) was dismissed pursuant to § 1203.4 PC.

- (3) On March 23, 2001, the applicant was arrested by the Los Angeles Police Department and charged with one count of inflicting corporal injury on a spouse or cohabitant, in violation of section 273.5(a) PC, a felony. The disposition of this charge is detailed in No. (2) above.

On appeal, counsel states that under California State Law, where the imposition of sentence for a crime originally charged as a felony, shall become a misdemeanor, where a "light county term and fine type

sentence" is imposed. He further states that on January 17, 2002, the court granted a motion to expunge, under California § 1203.4, and officially reduced the charge to a misdemeanor, vacated the plea of guilty, and set aside the conviction. Counsel asserts that this order relates back to the original order and charge, and therefore constitutes a retroactive change in the charges, and the plea.

These assertions of counsel are not persuasive. According to § 473 PC, forgery is punishable by imprisonment in the state prison, or by imprisonment in the county jail for not more than one year. If the court documents do not specify whether the defendant is being charged with a felony or a misdemeanor, an offense with this type of alternate punishment is considered a "felony" unless the defendant is in fact fined or sentenced to county jail, in which case the state considers the offense a "misdemeanor". See *MacFarlane v. Department of Alcoholic Beverage Control*, 326 P.2d 165, 167 (1958), 330 P.2d 769, 772 (1958). In this applicant's case, the records of the Los Angeles County Municipal Court specifically identified the charge of forgery in violation of § 470(d) as a felony, the applicant was charged with the felony offense, and he pled guilty to the felony offense.

Furthermore, even if the court documents had not specified that the charge was a felony, the sentencing in the applicant's case would be consistent with a felony conviction; the judge did not merely impose a jail sentence, nor did he simply fine the applicant. See *People v. Banks*, 338 P.2d 214, 215 (1959), 348 P.2d 102, 113 (1959). (In *Banks*, the defendant pled guilty, the proceedings were suspended, and the defendant was placed on probation for a period of three years; the court held that the defendant had been convicted of a felony, not a misdemeanor.) Additionally, according to section 101(a)(48)(B) of the Act, 8 U.S.C. § 1101(a)(48)(B), "any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law **regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.**" (Emphasis added.) Accordingly, it is concluded that the applicant was, in fact, convicted of a felony, not a misdemeanor.

The record indicates that on January 17, 2002, approximately 2½ years after the applicant's felony conviction of forgery, the court amended the felony to a misdemeanor and dismissed the case pursuant to § 1203.4 PC. However, the Board of Immigration Appeals (BIA), 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, 8 U.S.C. § 1101(a)(48)(A), 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. Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under state law. State rehabilitative actions that 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*. Therefore, despite the subsequent reduction (from a felony to a misdemeanor) and expungement of the charge, the applicant remains convicted, for immigration purposes, of the felony offense of forgery.

The most commonly accepted definition of a crime involving moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *Jordan v. De George*, 341 U.S. 223, reh'g denied, 341 U.S. 956 (1951). The crime of forgery (No. 2 above) is a crime involving moral turpitude. *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980); *Matter of Jimenez*, 14 I&N Dec. 442 (BIA 1973); *Animashaun v. INS*, 990 F.2d 234 (5th Cir. 1993). Therefore, the applicant is inadmissible to the United States, pursuant to section 212(a)(2)(A)(i)(I) of the Act, based on his felony conviction found to be a crime of moral turpitude.

The applicant is ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on his felony conviction. Furthermore, the applicant's conviction of a crime involving moral turpitude renders him inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act. There is no waiver available to an alien found inadmissible under this section. 244(c)(1)(A)(iii) of the Act and 8 C.F.R. § 244.3(c)(1).

Nor is there a waiver available for convictions of a felony or two or more misdemeanors committed in the United States. Consequently, the applicant's temporary protected status will be withdrawn.

Furthermore, a conviction of transporting or selling a narcotic controlled substance [No. (1) above] may render the applicant inadmissible to the United States pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act. However, the arrest report and the final court disposition of the above arrest is not included in the record of proceeding. USCIS must address this arrest and/or conviction in any future decisions or proceedings.

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.