



U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: NOV 19 2007

[WAC 05 084 81646]
[SRC 99 219 53253]

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 California Service Center. Any further inquiry must be made to that office.

for 

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status (TPS) was withdrawn and his re-registration application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Honduras who was granted TPS on November 22, 1999. The director subsequently withdrew the applicant's status on March 30, 2006, because the applicant had been convicted of a felony or two or more misdemeanors.

On appeal, former counsel states:

The decision misapplies Section 244(c)(2)(B) of the Immigration and Nationality Act in ruling that [REDACTED], who has been in Temporary Protected Status (TPS) since 1998, was not eligible for TPS based on a prior criminal record. The decision relies on several prior convictions that were vacated by the Florida courts and improperly treats two misdemeanor convictions arising from a single transaction as separate convictions.

Section 244(c) of the Act, and the related regulations at 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state is eligible for TPS if the 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 that 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. Section 244(c)(2)(B)(i) of the Act and the regulations at 8 C.F.R. § 244.4(a).

The regulations at 8 C.F.R. § 244.1 define “felony” and “misdemeanor” as:

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 reflects the following offenses:

- (1) On September 5, 1985, the applicant was convicted of “refusal to pay fare” under Case Number [REDACTED] by a Judge in the Eleventh Judicial Court of Florida in and for Dade County, a misdemeanor.

(2) On June 3, 1986, the applicant was convicted of marijuana possession under Case Number [REDACTED] and driving with a suspended driver's license under Case Number [REDACTED] by a Judge in the Eleventh Judicial Court of Florida in and for Dade County, both misdemeanors.

(3) On July 24, 1986, under Case Number [REDACTED], a Judge in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County noted that the applicant had been found guilty of the charge of trafficking in cocaine (a felony) by the court upon the entry of a nolo contendere plea. The Judge issued an Order Withholding Adjudication committing the applicant to the custody of the Florida Department of Corrections for a three year period as a youthful offender under the Florida Statutes. The Judge stipulated that not more than the first year of the sentence should be served by imprisonment at a State Correctional Facility for Youthful Offenders, and not more than the following two years should be served in a Community Control Program as defined by Florida Statute.

On August 1, 1997, under Case Number [REDACTED], a Judge in Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County issued an Order Granting Petition for Writ be granted and that the orders withholding adjudication, imposing one year of youthful offender incarceration and two years of community control, entered in the cause on July 24, 1986, be vacated, set aside and held for naught.

On August 18, 1997, under Case Number [REDACTED] a Judge in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County issued an Order to Reseal Criminal History Record. The Judge noted that the applicant's criminal history record had been previously sealed by order of the Court entered December 6, 1990. The Court granted the applicant's oral motion to open the sealed record for the limited purpose of allowing him to present his petition for writ of error. The Judge then ordered that the applicant's criminal history record shall be sealed pursuant to the terms, conditions, and provisions of the Court's order of December 6, 1990, which order is expressly incorporated herein, with the exception that the record of this case, as set forth by this order, shall reflect that the orders withholding adjudication, imposing one year of youthful offender incarceration and two years of community control, entered in this cause on July 24, 1986, has been vacated by the court and the State has announced a *nolle prosequi* of all charges in this case.

(4) On June 22, 1988, the applicant was convicted under Case Number [REDACTED] of driving while his license was suspended by a Judge in the County Court in and for Dade County, Florida, a misdemeanor.

(5) On March 22, 1989, the applicant was convicted of resisting arrest without violence under Case Number [REDACTED] by a Judge in the Eleventh Judicial Court of Florida in and for Dade County, a misdemeanor.

- (6) On June 22, 1993, the applicant was convicted of driving under the influence under Case Number [REDACTED] by a Judge in the County Court in and for Dade County, Florida, a misdemeanor.

On appeal, the applicant submits court orders vacating charges detailed in Nos. 3 and 5 above. The court, in these two cases, found that the applicant's no contest pleas were involuntary under Florida Rule of Criminal Procedure, because he was not advised at the time he entered his plea, that his plea could subject him to deportation pursuant to the laws and regulations governing the Immigration and Nationality Act. Since these orders vacate the convictions on their merits, the applicant is no longer considered to have been "convicted" of the offenses detailed in Nos. 3 and 5 above. *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006). see also *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

Nevertheless, the applicant remains ineligible for TPS due to his remaining five misdemeanor convictions detailed in Nos. 1, 2, 4, and 6 above. Sections 244(c)(2)(B)(i) and 8 C.F.R. § 244.4(a). Consequently, the director's decision to withdraw the applicant's status is affirmed.

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 section 212(a)(2)(A)(i)(II) of the Act due to his drug-related conviction in No. 2 above. There is no waiver available for inadmissibility under this section of the Act. Therefore, the application must also be denied for this reason.

Also beyond the decision of the director, it is noted that the applicant has provided insufficient evidence to establish his continuous residence and continuous physical presence during the requisite time periods. 8 C.F.R. § 244.2 (b) and (c). Therefore, the application shall be denied for these reasons as well.

In removal proceedings held on August 2, 1991, an Immigration Judge in Miami, Florida, ordered the applicant deported to Honduras.

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.