



U.S. Citizenship
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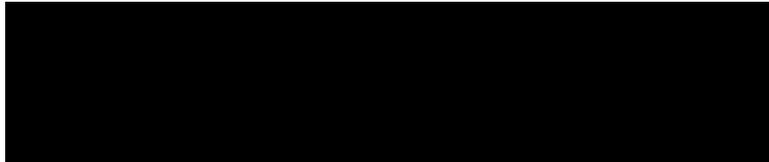
OFFICE: VERMONT SERVICE CENTER

DATE: OCT 05 2007

WAC 99 143 51714]

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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center, and the case is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Honduras who was granted Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254, on December 21, 1999. The director subsequently withdrew the applicant's TPS on April 19, 2007, when it was determined that the applicant had been convicted of two misdemeanor offenses.

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. Section 244(c)(3)(A) of the Act and 8 C.F.R. § 244.14(a)(1).

An alien shall not be eligible for temporary protected status 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.

The record reveals the following offenses:

- (1) On November 30, 1995, in the Municipal Court of California, County of San Diego, San Diego Judicial District, Case No. [REDACTED] (arrest date October 31, 1995), the applicant was convicted of battery/use force or violence, 242/243(a) PC, a misdemeanor. He was placed on probation for a period of 3 years, ordered to pay restitution fine in the amount of \$200, and attend and complete court ordered Domestic Violence Recovery Program.
- (2) On March 3, 2003, in the Superior Court of California, County of San Diego, Case No. [REDACTED] (arrest date January 31, 2003), the applicant was convicted of driving under the influence of alcohol/drug, 23152(a) VC, a misdemeanor. His 180 days sentence was suspended and he was placed on probation for a period of 5 years, ordered to pay \$1,223 in fines and costs, and driving was restricted for 90 days.

On appeal, counsel asserts that the applicant was not aware that two misdemeanors would result in a bar of TPS benefits; therefore, the applicant has hired a criminal defense attorney to reduce or vacate one of the misdemeanors to an infraction. Counsel subsequently submits the minutes/docket of the Superior Court of the State of California, County of San Diego, dated August 24, 2007, relating to the applicant's conviction of 242/243(a) PC (No. 1 above), indicating that the "motion to vacate the plea is granted. Charges dismissed per 1385 and the people do not object." Counsel also submits an order from the Superior Court regarding Case No. [REDACTED] (No. 1 above), ordering that the "plea entered in this case is hereby vacated as legally invalid, *habeas pro tunc*, to November 30, 1995." Counsel asserts that the applicant stands convicted of only a single misdemeanor; therefore, he is eligible for TPS.

California Penal Code § 1385 states, in part:

The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

Neither the minutes nor the order of the Superior Court, furnished by counsel on appeal, contains the reasons for the dismissal of the applicant's conviction as required by PC § 1385. As held in *Matter of Chavez-Martinez*, 24 I&N Dec. 272 (BIA 2007), an alien seeking to reopen proceedings to establish that a conviction has been vacated bears the burden of proving that the conviction was not vacated solely for immigration purposes. Furthermore, 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*, 22 I&N Dec. 512, (BIA 1999). Therefore, the applicant remains convicted, for immigration purposes, of the misdemeanor offense detailed in No. 1 above.

The applicant is ineligible for TPS due to his two misdemeanor convictions, detailed in Nos. 1 and 2 above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to withdraw the applicant's TPS will be affirmed.

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.