

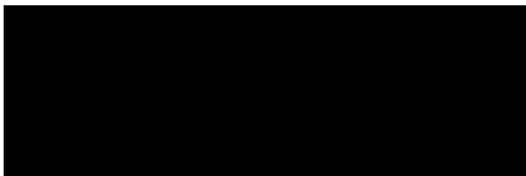
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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529

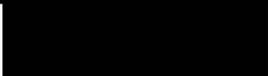


U.S. Citizenship
and Immigration
Services

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FILE:



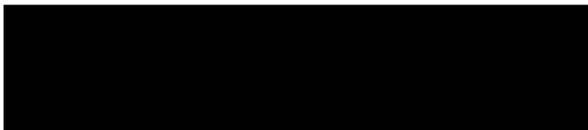
OFFICE: CALIFORNIA SERVICE CENTER

DATE: **JAN 0 2008**

[WAC 09 223 50077]
[WAC 0508870166]

INRE:

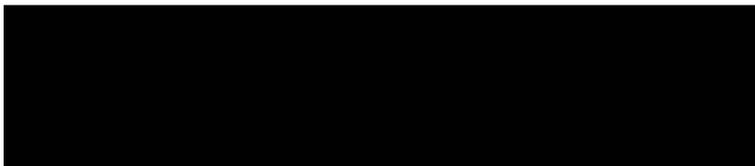
Applicant:



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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, California Service Center, and the case is now before the Administrative Appeals Office on appeal.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

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 May 17,2000. The director subsequently withdrew the applicant's TPS status on May 18,2006, when it was determined that the applicant had been convicted of two or more misdemeanors or a felony. On the same date, May 18, 2006, the director also denied the applicant's re-registration application, filed on December 27, 2004, under Citizenship and Immigration Services (CIS) receipt number WAC 05 088 70166, because the applicant was not eligible for TPS based on his convictions.

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 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 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:

- (1) On December 3, 1990, in Los Angeles, California, under Case No. _ the applicant (name used: _ was convicted of carrying a loaded firearm, 12031(a) PC, a misdemeanor. He was sentenced to 45 days in jail, and placed on probation for a period of 24 months.
- (2) On June 26, 1996, in the Canton Municipal Court, Canton, Ohio, Case No. _ , the applicant (name used: _ was indicted for Count 1, leaving the scene of an accident, Ohio Revised Code (ORC) 335.12, a misdemeanor; Count 2, failure to report accident in 24 hours,

ORC 335.15, a misdemeanor; Count 3, right of way at stop signs, ORC 331.19, a minor misdemeanor;! and Count 4, illegal plates, ORC 335.11, a minor misdemeanor. On July 21, 1998, the court dismissed all 4 counts.

- (3) On December 8, 1998, in the Canton Municipal Court, Canton, Ohio, Case No. [REDACTED] the applicant (name used: [REDACTED]) was indicted for domestic violence, ORC 2919.25, a misdemeanor. On January 25, 1999, the charge was amended to disorderly conduct, a misdemeanor, and the applicant was convicted of disorderly conduct. He was sentenced to 30 days in jail, all but one day suspended on condition of good behavior for two years.
- (4) On September 9, 2002, in the Canton Municipal Court, Canton, Ohio, Case No. [REDACTED] the applicant was convicted of possession of open container, ORC 529.07, a minor misdemeanor. He was ordered to pay \$20 in fines and costs. Because this offense is not punishable by imprisonment, it is not considered a misdemeanor for immigration purpose. 8 C.F.R. § 244.1. On appeal, counsel submits an order of the Canton Municipal Court, dated November 20, 2006, dismissing the case "without prejudice."

On appeal, counsel asserts that the applicant has only one misdemeanor conviction (No. 1 above) because his convictions for disorderly conduct (No.3 above) and possession of open container (No.4 above) were dismissed by the court. She submits court records to support her assertion. Counsel further asserts that the applicant's conviction of disorderly conduct was vacated because it was defective, as a matter of law, under the law of the State of Ohio, and that the action of the Canton Municipal Court was not intended to be rehabilitative, and was not rehabilitative, and that the applicant's motion to vacate his plea was also based, in whole or in part, on Ohio Revised Code § 2943.031. Counsel cited *Matter of Adamiak*, 23 I&N Dec. 878 (BrA 2006), in which the BIA held that a conviction vacated pursuant to section 2943.031 of the Ohio Revised Code for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes.

In a hearing held on July 13, 2006, the Canton Municipal Court sustained the applicant's motion to vacate the plea entered on January 25, 1999, under Case No. [REDACTED] (No.3 above) based on the defendant's assertion that he was not advised pursuant to O.R.C. 2943.031 that a conviction of the charge to which he was pleading could result in deportation. On July 19, 2006, a Judgment Entry was entered and the court dismissed the charge, under Case No. [REDACTED], without prejudice.

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, (BrA 1999). In this case, the dismissal of the applicant's conviction of disorderly conduct was vacated or dismissed on the merits, and was not rehabilitative. Therefore, the applicant was not convicted, for immigration purposes, of the misdemeanor offense of disorderly conduct.

The applicant's one misdemeanor conviction (No.1 above) does not render the applicant ineligible for TPS under the provisions of section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a), as an alien who has been convicted of a felony or two or more misdemeanors committed in the United States. There are no other known grounds of ineligibility; therefore, the director's decision to withdraw the applicant's Temporary Protected Status will, itself, be withdrawn, and the application will be approved.

! According to ORC 2901.02, the penalty for a minor misdemeanor committed prior to the effective date of this amendment [January 1, 2004] is a fine not exceeding one hundred dollars.

The director's denial of the application for re-registration or renewal is dependent upon the adjudication of the initial application. Since the applicant has overcome the withdrawal of her TPS, the denial of the re-registration will be withdrawn and that application will also be approved.

The burden of proof is upon the applicant to establish 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 met that burden.

ORDER: The appeal is sustained and the applications are approved.