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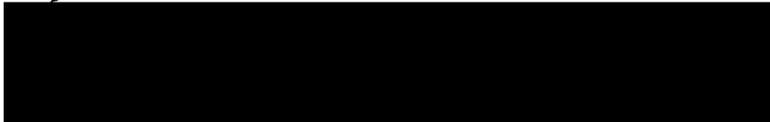
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

[SRC 99 121 54604]

OFFICE: VERMONT SERVICE CENTER

DATE: JAN 29 2008

IN RE:

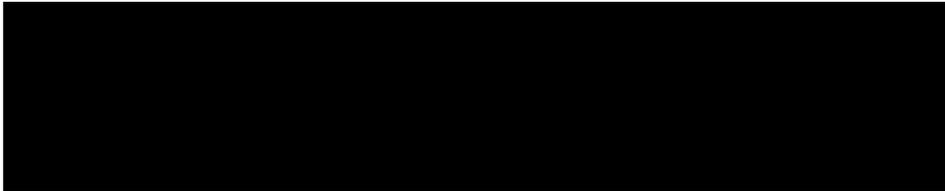
Applicant:



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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, withdrew the applicant's Temporary Protected Status. The matter is now before the Administrative Appeals Office on appeal. The case will be remanded for further consideration and action.

The applicant claims to be a native and citizen of Honduras who is seeking TPS under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director withdrew the applicant's TPS because he found the applicant ineligible under section 244(c)(2)(B)(i) of the Act because he has been convicted of at least two misdemeanors.

On appeal, counsel asserts that the applicant "was not advised of the immigration consequences" of his pleas and that his due process was violated.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state is eligible for TPS only if such 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 which 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. 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.

The record reveals the following offenses:

1. On January 28, 1994, the applicant was convicted in the Dade County (Florida) County Court of a violation of Florida Statute section 316.193, driving under the influence (DUI) of alcohol. Case no. [REDACTED]
2. On April 3, 1998, the applicant was convicted in the Dade County Circuit Court of the offense of misdemeanor battery. Case no. [REDACTED]

On appeal, counsel submits a copy of an October 18, 2007, order from the Judicial Circuit in and for Dade County granting the applicant’s motion to vacate the judgment and sentence of DUI. The court determined that the applicant had not been informed of the immigration consequences of his guilty plea to the DUI offense. Since this order vacates the conviction on the merits of the case, the applicant is no

longer considered to have been “convicted” of the offenses of DUI. *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006). *See also Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

Nonetheless, the record reflects that the State of Florida, through the Assistant State Attorney, filed an appeal of the judge’s decision on October 18, 2007. The record does not reflect a disposition of that appeal.

Accordingly, the record is remanded to the director for determination and further consideration pending the final appellate review of the applicant’s state court motion. The director may request any evidence deemed necessary to assist with the determination of the applicant’s eligibility for TPS. 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 director's decision is withdrawn. The case is remanded for appropriate action consistent with the above discussion and entry of a new decision.