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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: San Francisco Date: MAR 03 2004

IN RE: Applicant: [redacted]

APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254

IN BEHALF OF APPLICANT: Self-represented

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Cindy M. Gomez for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the district director for further action.

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 director determined that the applicant failed to submit certified court documents of all her arrests as requested on April 10, 2002, including her arrest on April 1, 1999 for (1) "transport/sell" a controlled substance, (2) possession/purchase coke base cocaine for sale, and (3) conspiracy. Because the Service could not determine the applicant's inadmissibility to the United States based on her failure to submit court documents, the director concluded that the applicant was ineligible for TPS and denied the application accordingly.

On appeal, the applicant submits the court record of the April 1, 1999 arrest. She claims that she pled not guilty and the charges were dismissed.

8 C.F.R. § 103.3(a)(2) states, in pertinent part, that the affected party shall file an appeal, with fee, including any supporting brief with the office where the unfavorable decision was made within 30 days after service of the decision.

8 C.F.R. § 103.3(a)(2)(v)(B)(1) states, in part:

> An appeal which is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

The record reflects that the director denied the application on July 17, 2002. The applicant was advised that she may file an appeal, along with the required fee, within 30 days of the date of the decision, and by August 16, 2002. On September 11, 2002, approximately 56 days after the director's decision, the appeal was received, with fee, at the San Francisco District office, the office where the unfavorable decision was made.

8 C.F.R. § 103.3(a)(2)(v)(B)(2) states, in part:

> If an untimely appeal meets the requirements of a motion to reopen as described in § 103.5(a)(2) of this part or a motion to reconsider as described in § 103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

The applicant's appeal, in this case, meets the requirements of a motion.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an alien who is a national of a foreign state designated by the Attorney General is eligible for temporary protected status only if such alien establishes that he or she:

(a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign 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 TPS 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.

Pursuant to section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a), an alien shall not be eligible for temporary protected status if the Attorney General finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States.

Section 212(a)(2) of the Act, 8 U.S.C. § 1182(a)(2), provides that aliens inadmissible and ineligible to receive visas and ineligible to be admitted to the United States include:

(A)(i) Any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of --

(II) a violation of (or a conspiracy or attempt 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 U.S.C. § 802).

* * *

(C) Any alien who the consular officer or immigration officer knows or has reason to believe is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in

the illicit trafficking in any such controlled substance, is inadmissible.

The record reflects that on April 5, 1999, in the Superior Court of California, City and County of San Francisco, Case No. [redacted] the applicant was indicted for Count 1, possession for sale and purchase of cocaine base, in violation of 11351.5 HS, a felony. On May 11, 1999, a second charge of possession of narcotic controlled substance (cocaine), in violation of 11350(a) HS, a felony, was added to the indictment. On June 18, 1999, the applicant was granted drug diversion in accordance with Title 6, section 1000.2 of the California Penal Code (PC).

Pursuant to section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101((a)(48)(A), the term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where --

> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Under section 1000.2 PC, a defendant is not required to enter a plea or to admit any facts sufficient to warrant a finding of guilt. Further, the court may place a defendant on probation and defer further proceedings without entering a judgement of guilt. The judge, in this case, did not find the applicant guilty of the offenses. Nor did the judge order any form of punishment, penalty, or restraint on the applicant's liberty. On January 19, 2000, the charges were dismissed by the court based on successful diversion.

The applicant's felony offenses, in this case, do not meet the definition of "conviction." The applicant, therefore, has not been convicted of the drug offenses, and sections 212(a)(2)(A)(I)(II) and 212(a)(2)(C) are not grounds for denial of the applicant's TPS application. Therefore, the applicant has overcome the sole reason for the director's denial.

However, it is noted that the record, as currently constituted, does not contain sufficient evidence to establish that the

applicant has met the other requirements under TPS. Specifically, the applicant has not submitted evidence to establish continuous physical presence or residence during the requisite time frame. Further, it is noted that the applicant claimed to be a citizen of Mexico at the time of her arrests.

Accordingly, the case will be remanded so that the director may render a full adjudication of the application, and to allow time for the applicant to submit additional evidence. The director shall enter a new decision which, if adverse to the applicant, is to be certified to the AAO for review.

ORDER: The district director's decision is withdrawn. The case is remanded for appropriate action consistent with the above discussion and entry of a new decision.