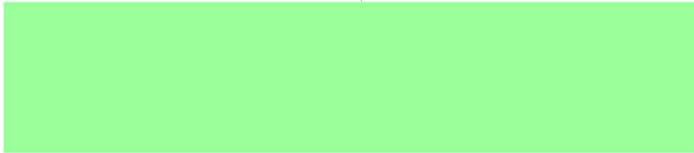


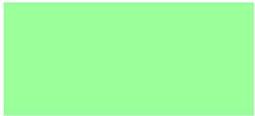
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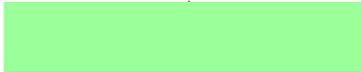
U.S. Citizenship
and Immigration
Services



DATE: **FEB 22 2013** Office: NEBRASKA SERVICE CENTER



IN RE: Applicant:



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

ON BEHALF OF APPLICANT: Self-represented

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the Nebraska Service Center. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

The director denied the application because the applicant had been convicted of several felonies, misdemeanors and aggravated felonies. The director also denied the application because he found the applicant inadmissible under sections 212(a)(2)(A)(i)(II) and 212(a)(2)(B) of the Act.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record reflects that on August 22, 2011, the director issued separate notices denying the applicant's Form I-821, Application for Temporary Protected Status, and Form I-765, Application for Employment Authorization. A Form I-290B, Notice of Appeal or Motion, was filed on September 16, 2011, and the applicant indicated at Part 2 that he was filing a motion to reopen from the denial of the Form I-765. However, the applicant listed the receipt number for the Form I-821. Due to this inconsistency, the director treated the Form I-290B as a motion for the Form I-821. On June 18, 2012, the director, granted the motion, reviewed the record of proceeding including the evidence submitted on motion, and determined that the grounds for denial had not been overcome. No appeal has been filed from the June 18, 2012 decision.

On September 19, 2011, a Form I-290B was filed and the applicant indicated at Part 2 that he was filing an appeal from the denial of the Form I-821 and listed the receipt number for the form. This Form I-290B (LIN1290012449) will be considered on appeal before the AAO.

On appeal, the applicant submits a brief disputing the director's findings. The applicant states that he has filed motions to vacate several of his convictions. The applicant asserts that his 2009 and 2010 convictions are on appeal before the Appellate Division of the Supreme Court of the State of New York and, therefore, they cannot be counted as convictions for immigration purposes.

An alien shall not be eligible for Temporary Protected Status (TPS) 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).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception 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 actually served. Under this exception, for purposes of 8 C.F.R. § 244 of the Act, the crime shall be treated as a misdemeanor. 8 C.F.R. § 244.1.

"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. 8 C.F.R. § 244.1.

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act.

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible. Section 212(a)(2)(B) of the Act.

The court documents in the record reveal the following offenses in the state of New York:

1. On September 23, 1986 the applicant pled guilty in the [REDACTED] to violating NYPL § 120.15, menacing, a Class B misdemeanor. The applicant was sentenced to one year conditional discharge. Case no [REDACTED]
2. On November 14, 1988, the applicant pled guilty in the [REDACTED] to violating NYPL § 165.40, criminal possession of stolen property-5th degree, a Class A misdemeanor. The applicant was sentenced to serve 60 days in the [REDACTED] penitentiary. Case no. [REDACTED]
3. On December 23, 1989, the applicant pled guilty in the [REDACTED] to violating NYPL § 170.20, possession of forged instrument-3rd degree, a Class A misdemeanor. The applicant was ordered to pay a fine and was placed on probation for three years. Case no. [REDACTED]
4. On June 18, 1991, the applicant was convicted in the [REDACTED] of violating NYPL § 120.20, reckless endangerment, NYPL 205.30, resisting arrest, both Class A misdemeanors and NYPL § 120.00(1) attempted assault- 3rd Degree, a Class B misdemeanor. For each offense the applicant was sentenced to intermittent 90 days conditional discharge. Case no. [REDACTED]
5. On December 23, 1997, the applicant pled guilty in the [REDACTED] to violating NYPL § 155.35, attempted grand larceny-3rd degree – property exceeds \$3000. a Class E felony. The applicant was placed on probation for five years. Case no [REDACTED]
6. On June 2, 2003, the applicant was convicted in the [REDACTED] of violating NYPL § 170.20, possession of forged instrument-3rd degree, a Class A misdemeanor. The applicant was placed on probation for three years. The applicant violated his probation and on March 28, 2007, the applicant was sentenced to two months in jail. Case no. [REDACTED]

7. On July 15, 2003, the applicant pled guilty in the [REDACTED] to two counts of violating NYPL § 175.05(1), falsify business records, Class A misdemeanors.¹ For each count the applicant was ordered to pay a fine and was placed on one-year conditional discharge. Case no. [REDACTED]
8. On January 12, 2007, the applicant pled guilty in the [REDACTED] to violating NYPL § 155.35, grand larceny-3rd degree – property value exceeds \$3000, a Class D felony, and NYPL § 155.30, grand larceny-4th degree, value property greater than \$1000, a Class E felony. The applicant was sentenced to six months of imprisonment for violating NYPL § 155.35 and was sentenced to conditional discharge for violating NYPL § 155.30. Case no. [REDACTED]
9. On January 13, 2009, the applicant pled guilty in the [REDACTED] of violating NYPL § 190.80(1), attempted identity theft -1st degree, a Class E felony. The applicant was sentenced to serve 18 months to 3 years in prison. Case no. [REDACTED]
10. On March 15, 2010, the applicant pled guilty in the [REDACTED] of violating NYPL § 155.40(1), grand larceny-2nd degree – property value exceeds \$50,000, a Class E felony, and NYPL § 155.35, grand larceny-3rd degree – property value exceeds \$3000, a Class D felony. The applicant was sentenced to serve 4 to 8 years of imprisonment for violating NYPL § 155.40(1) and was sentenced to serve 6 to 7 years of imprisonment for violating NYPL § 155.35. Case no. [REDACTED]
11. On August 9, 2010, the applicant pled guilty in the [REDACTED] of violating NYPL § 155.35, grand larceny-3rd degree – property value exceeds \$3000, a Class D felony. The applicant was sentenced to serve 2 to 4 years of imprisonment. Case no. [REDACTED]

The applicant asserts that he has filed motions to vacate his convictions in numbers two, three, five and six above. As evidence, the applicant submits: 1) a copy of a motion to vacate judgment dated July 7, 2011 from the [REDACTED] regarding indictment no. [REDACTED] 2) a motion to vacate judgment from the [REDACTED] dated July 13, 2001 regarding indictment no. [REDACTED] and 3) a motion to vacate judgment dated July 15, 2011 for number five above.

However, more than 18 months later, no documents from the courts have been provided regarding the final outcome of the applicant's motion to vacate the misdemeanor and felony convictions. Without certified documents from the courts indicating that each conviction has been vacated for underlying procedural or constitutional defect having to do with the merits of the case, the misdemeanor and felony convictions continue to affect immigration consequences. *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006), *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

¹ The director inadvertently noted in his denial notice that the applicant had pled guilty to falsify business records and 3rd degree forgery. The court document in the record clearly indicates, "DEFT PLED GUILTY TO PL-175.05, 2 COUNTS FINE \$500 ON EACH 1 YR CD."

For numbers four and seven above, the applicant asserts that part of his sentence included conditional discharge. The applicant states because he had no arrests in 1992 and 2004, the convictions can no longer be counted and/or viewed as part of his criminal convictions.

The applicant's assertion is without merit as he entered a plea of guilty to violating NYPL §§ 120.20, 205.30 and 120.00(1) and the judge ordered some form of punishment or penalty (90 days of conditional discharge.) The applicant, therefore, had been convicted within the meaning of section 101(a)(48)(A) of the Act. Under the statutory definition of "conviction" at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to reduce, expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. See *Matter of Roldan*, 22 I&N Dec. 512. Any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528.

For numbers nine, ten and eleven, the applicant asserts that each conviction is on direct appeal before the [REDACTED] Appellate Division, First Department and, therefore, they cannot be considered convictions for any immigration proceedings. As evidence, the applicant submits copies of notices of appeal dated December 9 and 20, 2010.

The applicant's assertion is without merit. In *Puello v. Bureau of Citizenship & Immigration Servs.* 511F.3d 324, 331-32 (2d Cir. 2007), it was concluded that, "[t]he term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court," regardless whether appeals have been exhausted or waived.

The director erroneously refers to a section of the Act that is not applicable to the applicant in these proceedings. Section 101(a)(43) of the Act defines aggravated felonies for purposes of determining classes of deportable aliens under section 237(a)(2)(A)(iii). In determining whether the applicant is eligible for TPS, we look to section 244(c)(2)(B)(i) of the Act, not to section 101(a)(43)(G) of the Act. These sections are distinguishable, in that section 101(a)(43)(G) takes into account the actual sentence imposed, while section 244(c)(2)(B)(i) is only concerned with the maximum possible penalty for the crime.

The regulations at 8 C.F.R. § 244.1 define a felony as a crime punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served. In the applicant's case, he was convicted of crimes punishable by imprisonment of at least one year to fifteen years. For purposes of TPS eligibility, the applicant has been convicted of felonies, regardless of the punishment handled down by the court.

The applicant is ineligible for TPS due to his misdemeanor and felony convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). There is no waiver available, even for

humanitarian reasons, of the requirements stated above. Consequently, the director's decision to deny the application on these grounds will be affirmed.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The court documents in the record for number one above are not sufficient for the AAO to make a determination that the conviction constitutes a crime involving moral turpitude.

For an individual to be convicted of fifth degree criminal possession of stolen property under NYPL § 165.40, a defendant must “knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof.” This crime is a type of theft, a type of offense that has long been recognized as involving moral turpitude. In *Michel v. INS*, 206 F.3d 253, 263-64 (2d Cir. 2000), the Second Circuit Court of Appeals affirmed the Board of Immigration Appeal’s determination that fifth-degree criminal possession of stolen property in violation of NYPL § 165.40 is categorically a crime involving moral turpitude. The Court concluded that “all violations of New York Penal Law § 165.40 are, by their nature, morally turpitudinous because knowledge is a requisite element of section 165.40 and corrupt scienter is the touchstone of moral turpitude.” Accordingly, the AAO finds that the applicant’s conviction in number two above is a crime involving moral turpitude.

NYPL § 170.20, possession of a forged instrument in the third degree, provides:

A person is guilty of criminal possession of a forged instrument in the degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses a forged instrument.

NYPL § 170.00(7) defines a “forged instrument” as “a written instrument which has been falsely made, completed, or altered.” Conviction of criminal possession of forged devices with intent to use them for the purpose of forgery is a conviction of a crime involving moral turpitude. *Matter of Jimenez*, 14 I. & N. Dec. 442, (BIA 1973). Criminal possession has been held to be a

crime involving moral turpitude when accompanied by intent to commit a crime involving moral turpitude, *U.S. ex rel. Guarino v. Uhl*, 107 F.2d 339 (C.A. 2, 1939). Forgery has been held to be a crime involving moral turpitude. *Matter of A-*, 5 I. & N. Dec. 52 (BIA 1953); *Morasch v. INS*, 363 F.2d 30 (C.A. 9, 1966); *US. ex rel. Robinson v. Day*, 51 F.2d 1022 (C.A. 2, 1931). Accordingly, the AAO finds that the applicant's convictions in numbers three and six above constitute crimes involving moral turpitude.

The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. See *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). Although NYPL §§ 155.30 and 155.35 do not make a distinction as to whether a conviction under these sections of the statute would constitute a permanent or temporary taking, New York courts have found that to establish larcenous intent, a permanent taking must be intended.

Larceny is defined in NYPL § 155.05 as "when, with the intent to deprive another of property or to appropriate the same to himself or to a third person, [a person] wrongfully takes, obtains or withholds such property from an owner thereof." Deprive is defined in paragraph 3 of NYPL § 155.00:

To "deprive" another of property means (a) to withhold property or cause it to be withheld from another permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to the owner, or (b) to dispose of the property in such a manner or under such circumstances as to render it unlikely that an owner will recover such property.

New York courts have also indicated that larcenous intent is shown when the defendant intends to exercise control over another's property for so an extended period or under such circumstances as to acquire the major portion of its economic value or benefit. See *People v. Jennings*, 69 N.Y.2d 103, 118-122, 504 N.E.2d 1079, 1086-89 (N.Y. 1986). In *People v. Hoyt*, 92 A.D.2d 1079, 461 N.Y.S.2d 569, 570 (N.Y. App. Div. 3rd Dept. 1983) the court found that to warrant a larceny conviction, intent to permanently deprive the owner of his property must be established and that a temporary withholding of property, by itself, would not constitute larcenous intent.

In *Ponnapula v. Spitzer*, the Second Circuit Court of Appeals found that the acts covered by NYPL § 155.00 are permanent takings that manifest larcenous intent. 297 F.3d 172, 183-84 (2nd Cir. 2002). The court observed that while the intent to temporarily deprive an owner of property does not constitute larcenous intent, such a temporary deprivation occurs only where a person borrows property without permission with the intent to return the property in full to the owner after a short and discrete period of time. *Id.* at 184. Thus, the AAO finds for the applicant to be convicted of any crime involving larceny under the NYPL, it must have been established that he intended to permanently take another person's property. Therefore, the applicant's convictions for grand larceny are crimes involving moral turpitude.

Therefore, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act due to his convictions detailed above. Consequently, the director's decision to deny the application on these grounds will also be affirmed.

The applicant is also inadmissible to the United States pursuant to section 212(a)(2)(B) of the Act based on his convictions of 2 or more offenses for which the aggregate sentences to confinement actually imposed were 5 years or more. Consequently, the director's decision to deny the application on this ground will also be affirmed.

It is noted for the record that removal proceedings were held on April 28, 2011, the applicant was ordered removed from the United States. On October 25, 2011, the applicant was removed from the United States to Haiti.

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 TPS 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.