U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 3 0 2013 Office: CALIFORNIA SERVICE CENTER [redacted]

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

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 California 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The re-registration application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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

The director denied the re-registration application because the applicant had been convicted of a felony in the United States.

On appeal, counsel citing *Padilla v. Kentucky*, 130 S. Ct. 1473 (U.S 2010)[1] asserts that at the time of the applicant's plea, his defense counsel failed to advise him of the immigration consequences of a guilty plea. Counsel submits a copy of the applicant's motion for post-conviction relief filed before the Circuit Court on August 28, 2012. Counsel states that the applicant will supplement his appeal once a decision has been reached by the court relating to his motion for post-conviction relief.

An alien shall not be eligible for 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.

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, 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. Section 101(a)(48)(A) of the Act.

[1] Counsel must inform a client whether his plea carries a risk of deportation.

In response to notices dated October 20, 2011 and February 21, 2012, which requested the applicant to submit certified judgment and conviction documents from the courts for all arrests, the applicant submitted court documentation in Case number 11-2011-CF-001001-CXXX-XX from the Circuit Court, Twentieth Judicial Circuit, in and for Collier County, Florida. The court documentation reflects that on May 5, 2011, the applicant was arrested and charged with establish gambling place keep house for, resist officer - obstruct without violence and lottery - operating set up promote conduct for money. On June 6, 2011, the charges were amended to indicate lottery-playing possess ticket, a violation of Florida Status 849.09(1)(h), a first degree misdemeanor, and Florida Statute 849.09(1)(d);777.011, lottery - aid setting up, promoting, or conducting for money, a third degree felony. On January 5, 2012, the applicant pled no contest to violating Florida Statute 849.09(1)(d);777.011. Adjudication of guilt was withheld and the applicant was placed on probation for 18 months and ordered to pay court costs.

Counsel's statements have been considered; however, no evidence has been provided on appeal to support his assertion that the applicant had not been advised of the possible immigration consequences of a plea by either his counsel or the trial court. The assertion of counsel does not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO concludes that the felony conviction continues to effect immigration consequences. Furthermore, the adjudication of an appeal will not be held in abeyance while an applicant is seeking post-conviction relief.

The applicant is ineligible for TPS due to his felony conviction. 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 for this reason will be affirmed.

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.

While not the basis for the dismissal of the appeal, it is noted that the record reflects that the applicant's Form I-589, Application for Asylum and Withholding of Removal, was filed on October 22 , 1999. A Form I-862, Notice to Appear, was issued and served on the applicant on December 7, 1999. A removal hearing was held and the applicant was ordered removed from the United States on April 22, 2002. The applicant appealed the immigration judge's decision to the Board of Immigration Appeals (BIA). On October 14, 2003, the BIA affirmed, without opinion, the decision of the immigration judge. On April 28, 2004, the applicant filed a motion to reopen, which was denied by the BIA on August 6, 2004.

ORDER: The appeal is dismissed.