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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



U.S. Citizenship
and Immigration
Services



DATE: JUL 23 2013

Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

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, Vermont 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 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 denied the application because the applicant remained convicted of two misdemeanors in the United States. The director also denied the application because the applicant failed to establish that she was eligible for late registration.

On appeal, counsel puts forth a brief disputing the director's finding.

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 Secretary 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.
- (g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of conditions described in paragraph (f)(2) of this section.

Persons applying for TPS offered to Hondurans must demonstrate that they have continuously resided in the United States since December 30, 1998, and that they have been continuously physically present since January 5, 1999. The initial registration period for Hondurans was from January 5, 1999, through August 20, 1999. Subsequent extensions of the TPS designation have been granted, with the latest extension granted until January 5, 2015, upon the applicant's re-registration during the requisite period.

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).

"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.

The burden of proof is upon the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by U.S. Citizenship and Immigration Services (USCIS). 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet his or her burden of proof, the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. 8 C.F.R. § 244.9(b).

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

The first issue in this proceeding is whether the applicant is eligible for late registration.

To qualify for late registration, the applicant must provide evidence that during the initial registration period she fell within at least one of the provisions described in 8 C.F.R. § 244.2(f)(2) above. If the qualifying condition or application has expired or been terminated, the individual must file within a 60-day period immediately following the expiration or termination of the qualifying condition in order to be considered for the late initial registration. 8 C.F.R. § 244.2(g).

The applicant filed the current TPS application on February 10, 2012.

The record reflects that deportation proceedings were held on January 20, 1999, and the applicant was granted voluntary departure in lieu of removal on or before May 3, 1999. The applicant filed an appeal before the Board of Immigration Appeals (BIA). On January 2, 2001, the BIA administratively closed the proceedings. On September 7, 2010, the Department of Homeland Security filed a motion to reinstate proceedings. On December 3, 2010, the BIA vacated its decision of January 2, 2001, reinstated proceedings, and remanded the case to the Immigration Judge (IJ) for further proceedings. On January 27, 2011, the IJ administratively closed the case.

Administrative closing of a case does not result in termination of the proceedings. It is merely an administrative convenience, which allows the removal of cases from the calendar in appropriate situations. See *Matter of Gutierrez-Lopez*, 21 I&N Dec. 479 (BIA 1996). Therefore, it is concluded that the applicant qualifies for late initial registration pursuant to 8 C.F.R. § 244.2(f)(2)(ii). Accordingly, the director's conclusion that the applicant had failed to establish her eligibility for late registration will be withdrawn.

The second issue to be addressed is the applicant's criminal history.

The applicant's initial TPS application [REDACTED] was denied by the Director, California Service Center on March 25, 2003, due to her two misdemeanor convictions in the United States. On June 29, 2005, the AAO affirmed the director's finding.

The director, in denying the current application on September 11, 2012, indicated that the record was still lacking evidence that the court vacated the convictions for reasons related to the merits of the underlying criminal proceeding. The record contains the following:

1. Court documentation in Case no. [REDACTED] from the Los Angeles County Municipal Court of California, which indicates that on March 1, 1989, the applicant was charged with petty theft, trespass-injure property. On March 2, 1989, the applicant was convicted of trespass – injure property, a violation of section 602(j) PC, a misdemeanor. The applicant was placed on probation for 24 months and was ordered to spend 2 days in jail. The remaining charge was dismissed. On January 24, 1997, the conviction was expunged in accordance with section 1203.4 PC.
2. Court documentation in Case no. [REDACTED] from the Los Angeles County Municipal Court of California, which indicates that on August 6, 1991, the applicant was charged with burglary and petty theft. On August 8, 1991, the

applicant was convicted of petty theft, a violation of section 484(a) PC, a misdemeanor. The applicant was placed on probation for 24 months and was ordered to spend 3 days in jail. The remaining charge was dismissed. On September 16 1997, the conviction was expunged in accordance with section 1203.4 PC.

The provisions of section 1203.4 PC do not function to dismiss a criminal conviction because of a procedural or constitutional defect in the underlying proceedings.

Along with the filing of her current TPS application, the applicant submitted court documentation in Case no. [REDACTED] from the Los Angeles County Municipal Court of California, which indicates that on May 3, 2011, a Motion to Vacate Conviction under section 1016.5 PC¹ was filed before the court. On September 7, 2011, the conviction was vacated pursuant to section 1385 PC in the furtherance of justice.²

It is noted that the applicant's motion included a declaration and a memorandum of points and authorities, which were not presented at the time the current application was filed and has not been presented on appeal.

On appeal, citing *Larin-Ulloa v. Gonzales*, 462 F.3d 456 (5th Cir. 2006), counsel states that if a conviction is dismissed for all purposes under the law of a state it should not be considered a conviction.

In applying the definition of a conviction under section 101(a)(48)(A) of the Act, the BIA found that there is a significant distinction between convictions vacated on the basis of a procedural or

¹ Section 1016.5 PC paragraphs (a) and (b) provide the following:

(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

² Section 1385(a) PC provides that a judge or magistrate may, either on his or her own motion or upon the application of the prosecuting attorney, and in the furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. Thus, if a court vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a “conviction” within the meaning of section 101(a)(48)(A) of the Act; if, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains “convicted” for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000); *Matter of Roldan*, 22 I&N Dec. 512, 523 (BIA 1999).

The courts have also found that a conviction vacated for equitable reasons is still deemed to be a conviction for immigration purposes. *Renteria-Gonzalez v. INS*, 322 F.3d 804, 812-14 (5th Cir. 2002). Where an order vacating a conviction was issued “in the interest of justice and equity and to avoid a manifest injustice,” the court found that it was still a conviction under *Pickering* because there was no evidence that the conviction was withdrawn from legal defect. *Pequeno-Martinez v. Trominski*, 281 F.Supp.2d 902, 926-27 (S.D. Tex. 2003).

It appears that the trial court vacated the conviction pursuant to section 1385 PC rather than the requested section 1016.5 PC. The court docket clearly indicates that the applicant had been advised on August 8, 1991 of the immigration consequences of a plea of guilty or *nolo contendere* and of a conviction of the offense. See Electronic Docket page 2. Section 1385 PC states that “[t]he reasons for the dismissal must be set forth in an order entered upon the minutes.” The dismissal order is ambiguous as to whether it was granted on grounds of procedural or constitutional defect and not for reasons solely related to rehabilitation or immigration hardships. Therefore, the applicant’s misdemeanor conviction remains in effect for immigration purposes.

The applicant remains ineligible for TPS due to her two misdemeanor convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director’s decision to deny the application on this ground 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.

ORDER: The appeal is dismissed.