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



U.S. Citizenship
and Immigration
Services

DATE: NOV 22 2013

Office: VERMONT SERVICE CENTER

FILE

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:

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
Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status (TPS) was withdrawn by the Director, Vermont Service Center (VSC). A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The AAO subsequently reopened the proceedings on its own motion, withdrew its previous decision and dismissed the appeal. The matter is again before the AAO on a motion to reopen. The motion will be granted. The case will be remanded for further action and consideration.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The record shows that the motion is properly filed, timely and makes a specific allegation of error in law or fact. On motion, the applicant submits additional evidence in an attempt to establish his eligibility for TPS. Thus the motion will be granted. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon motion.

As set forth in the director's denial and in the AAO's dismissal, the primary issue in this case is whether the applicant has been convicted of any felony or two or more misdemeanors and is therefore, ineligible for TPS.

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. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

The record reflects that the applicant was arrested on [REDACTED] 2009, by the [REDACTED] County Police of New York for criminal possession of a controlled substance in the third degree with intent to sell and criminal sale of a controlled substance in the third degree, a Class B Felony. Counsel submitted a letter dated March 8, 2011, indicating that the judgment or disposition of the applicant's arrest on February 24, 2009, could not be provided as it was still pending. Counsel asserted that the applicant was participating in a judicial diversion program that required a minimum of 18 months involvement.

On April 15, 2011, the director withdrew the applicant's TPS because he had failed to submit the requested court disposition relating to his criminal record. On February 9, 2012, the AAO upheld the director's decision as the documents submitted in response to the notice and on appeal were insufficient to overcome the director's finding.

Subsequently, counsel provided a copy of a FedEx US Airbill dated September 1, 2011, along with a tracking receipt, which indicates that correspondence was delivered to the address of the Vermont Service Center on September 2, 2011, at 10:18 a.m. Counsel provided court documentation in Case no. [REDACTED] from the County Court of the State of New York for [REDACTED] County, which indicates that on August 19, 2011, all pending charges and the case were dismissed.

Based on the documentation submitted on September 2, 2011, the AAO *sua sponte* reopened the matter for the purpose of considering the court documentation on appeal.

On April 5, 2012, the AAO sent a notice to the applicant, which informed him that the documentation submitted by counsel was not a complete record of the court's proceedings. Counsel, in response, resubmitted the court documentation in Case no. [REDACTED]. Counsel contended that court documentation "recites the history of the case: date of arrest and the final disposition of dismissal."

The AAO noted that successfully completing a pre-trial diversion program and obtaining dismissal of the charges may not constitute a conviction under immigration law as long as there has been no plea of guilty entered at any time. The AAO determined that the court documents submitted were silent to whether a guilty plea had been entered by the applicant. The AAO concluded that the applicant remained ineligible for TPS due to his failure to provide information necessary for the adjudication of his application, and on June 28, 2012, affirmed the director's decision to withdraw TPS.

On motion to reopen, counsel asserts that the court vacated the guilty plea and exonerated the applicant. Counsel submits an additional court document, which confirms that on June 24, 2009, the applicant pled guilty to criminal sale of a controlled substance in the third degree. On February 1, 2010, the [REDACTED] County Court ordered the guilty plea vacated and exonerated the applicant in the matter (Case No: [REDACTED]). The indictment was dismissed pursuant to CPL §§ 210.20 and 210.40, and the case was sealed under CPL § 160.50. In the instant case, the applicant claimed defect in the underlying criminal proceedings. As the state court has vacated the guilty plea and exonerated the applicant, this eliminates the immigration consequences under section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

The evidence of record reflects that the applicant does not have a felony or two misdemeanor convictions, and is not ineligible for TPS under the provisions of section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a). Therefore, the director's decision to withdraw the applicant's TPS and the decision of the AAO shall be withdrawn.

The record, however, reflects that the validity period of the applicant's fingerprint check has expired.

Accordingly, the case is remanded for the purpose of sending the applicant a fingerprint notification form, and affording him the opportunity to comply with its requirements. Thereafter, the director will render a new decision. Should the decision be adverse, the director must give



NON-PRECEDENT DECISION

written notice setting forth the specific reasons for the denial pursuant to 8 C.F.R. § 103.3(a)(1)(i), and the applicant shall be permitted to file an appeal without fee.

An alien applying for TPS has the burden of proving that he or she meets the requirements and is otherwise eligible for TPS under the provisions of section 244 of the Act.

ORDER: The motion is granted. The matter is remanded for further action. The decisions of the VSC director, dated April 15, 2011, and the AAO dated June 28, 2012, are withdrawn.