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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services



M1

FILE: [REDACTED]
[SRC 99 203 50399]

OFFICE: TEXAS SERVICE CENTER

DATE: MAR 28 2015

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: Self-represented

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

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

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 denied the application because the file contains documentation indicating that the applicant did not have residence and physical presence for the dates specified for Hondurans to receive TPS benefits.

On appeal, the applicant submits a statement and additional evidence.

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 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 Temporary Protected Status 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.

The term *continuously resided* as used in 8 C.F.R. § 244.1 means residing in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual, and innocent absence as defined within this section or

due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

The term *continuously physically present* as used in 8 C.F.R. § 244.1 means actual physical presence in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences as defined within 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. On May 11, 2000, the Attorney General announced an extension of the TPS designation until July 5, 2001. Subsequent extensions of the TPS designation have been granted with the latest extension valid until July 5, 2006, upon the applicant's re-registration during the requisite time period.

The record shows that the applicant filed his TPS application on June 21, 1999. On June 16, 2003, the applicant was advised that the Federal Bureau of Investigation (FBI) fingerprint results report indicates that he had a record of arrest. He was, therefore, requested to submit a Police History/Clearance Record from each government jurisdiction where he had resided during the past five years, and to provide the police report and the certified court disposition records for each arrest. He was also requested to submit photocopies of his identification documents. In response, the applicant submits court documents of his arrests, and copies of his Texas Identification Card, Republic of Honduras driver's license, and the biographical page of his Honduran passport.

The director determined that the applicant's file contains documentation indicating that the applicant did not have continuous residence and continuous physical presence for the dates specified for Hondurans to receive TPS benefits, and denied the application on October 28, 2003.

On appeal, the applicant asserts that he has provided evidence to establish that he has been residing in the United States since December 30, 1998, and has maintained continuous physical presence since January 1999 to the date of filing his application. He submits additional evidence in an attempt to establish continuous residence and continuous physical presence during the qualifying periods. He also resubmits copies of court documents relating to his arrests.

It is noted that the director failed to address the applicant's convictions in his decision to deny. Rather, he denied the application based on insufficient documentation establishing continuous residence and continuous physical presence described in 8 C.F.R. § 244.2(b) and (c).

The AAO notes its authority to affirm decisions which, though based on incorrect grounds, are deemed to be correct decisions on other grounds within its power to formulate. *Helvering v. Gowran*, 302 U.S. 238 (1937); *Securities Comm'n v. Chenery Corp.*, 318 U.S. 86 (1943); and *Chae-Sik Lee v. Kennedy*, 294 F.2d 231 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 926.

An alien shall not be eligible for temporary protected status 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).

8 C.F.R. § 244.1 defines "felony" and "misdemeanor:"

Felony means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except: 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 such alien actually served. Under this exception for purposes of section 244 of the Act, the crime shall be treated as a misdemeanor.

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.

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.

The record reveals the following offenses:

- (1) On May 20, 1996, in the 180th District Court of Harris County, Texas, Cause No. [REDACTED] (arrest date March 15, 1996), the applicant entered a plea of guilty to tampering with a government record, in violation of 42.12 Texas Penal Code, a felony. The court deferred adjudication of guilt and placed the applicant on community supervision for a period of 5 years, fined \$500, and ordered to complete 170 hours of community service.
- (2) On August 29, 1997, in the County Criminal Court at Law No. 9, Harris County, Texas, Case No. [REDACTED] (arrest date June 5, 1997), the applicant was convicted of assault resulting in bodily injury, a class A misdemeanor. He was sentenced to serve 75 days in the county jail.

On appeal, the applicant submits an order of the court, dated May 25, 2001, terminating the applicant's community supervision for Cause No. [REDACTED] No. 1 above). The court also authorized the state to prosecute the case as a misdemeanor under Texas Penal Code § 12.44(b), terminated deferred adjudication of guilt, discharged the applicant, and dismissed the case.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines the term "conviction:"

(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.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part. [Emphasis added.]

Notwithstanding the fact that adjudication of guilt was withheld, the record reflects that the applicant entered a plea of guilty and the judge ordered some form of punishment (5 years of community supervision, \$500 in fines, and 170 hours of community service). The applicant, therefore, had been convicted within the meaning of section 101(a)(48)(A) of the Act.

Furthermore, although the applicant's felony conviction was reduced to a misdemeanor and subsequently dismissed five years after his conviction (No. 1 above), Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under the state law. States rehabilitative actions that do not vacate a conviction on the merits are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Therefore, applicant remains convicted, for immigration purposes, of the felony offense detailed in No. 1 above.

The applicant is ineligible for TPS due to his felony conviction, detailed above. 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 will be affirmed.

It is noted for the record that subsequent to the applicant's appeal to the director's Notice of Decision to Deny dated October 28, 2003, the director issued a Notice of Intent to Deny dated December 8, 2003, and again on December 29, 2003. Both notices of intent requested that the applicant furnish court dispositions of his past arrests. The applicant, in both cases, resubmitted court dispositions previously furnished in response to the director's request for additional evidence on June 16, 2003, and again on appeal received at the Service Center on November 28, 2003. As the applicant is found ineligible for TPS based on his criminal convictions, these two subsequent notices of intent to deny are considered moot.

An alien applying for temporary protected status 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.