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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[REDACTED]

M1

FILE:

[REDACTED]

OFFICE: TEXAS SERVICE CENTER

DATE: AUG 18 2006

consolidated herein

[SRC 03 140 53788]

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:

[REDACTED]

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.

Cindy N. Gomez

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Texas Service Center. The application 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 she found the applicant had failed to submit sufficient evidence to establish that he was eligible for TPS in light of his failure to comply with multiple requests regarding the final court dispositions of his arrests.

On appeal, counsel asserts that the required disposition documents were previously mailed, and notes that the arrest dated April 7, 2004, is still pending and has not been finalized.

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 phrase continuously physically present, as defined 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.

The phrase continuously resided, as defined 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 phrase brief, casual, and innocent absence, as defined in 8 C.F.R. § 244.1, means a departure from the United States that satisfies the following criteria:

- (1) Each such absence was of short duration and reasonably calculated to accomplish the purpose(s) for the absence;
- (2) The absence was not the result of an order of deportation, an order of voluntary departure, or an administrative grant of voluntary departure without the institution of deportation proceedings; and
- (3) The purposes for the absence from the United States or actions while outside of the United States were not contrary to law.

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, 2007, upon the applicant's re-registration during the requisite time period.

The initial registration period for Hondurans was from January 5, 1999, through August 20, 1999. The record reveals that the applicant filed his initial TPS application with Citizenship and Immigration Services (CIS), on April 21, 2003.

The burden of proof is upon the applicant to establish that he meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by CIS. 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 burden of proof, the applicant must provide supporting documentary evidence of eligibility apart from his own statements. 8 C.F.R. § 244.9(b).

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, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC 802). Section 212(a)(2)(A)(i)(II) of the Act.

The record reveals the following offenses:

- (1) On July 25, 2002, the applicant was arrested by the Police Department, El Paso, Texas, and charged with Possession of Marijuana <2 oz.;
- (2) On September 28, 2002, the applicant was arrested by the Police Department, El Paso, Texas, and charged with Possession of Controlled Substance PG 1 < 1G;
- (3) On February 25, 2004, the applicant was arrested by the Police Department, El Paso, Texas, and charged with Possession of Marijuana <2 oz.;
- (4) On April 14, 2006, the applicant was arrested by the Police Department, El Paso, Texas, and charged with Delivery of Controlled substance/Marijuana To Minor;
- (5) On April 21, 2006, the applicant was arrested by the Police Department, El Paso, Texas, and charged with Theft >=\$500 <\$1,500;
- (6) On August 12, 2006, the applicant was apprehended by the Police Department, El Paso, Texas, while the police were investigating a burglary call.

On appeal, counsel directs attention to the previously submitted evidence, and notes that the unspecified “April 7, 2004,” charges are still pending.

The record reflects that the applicant plead guilty and was convicted on two separate occasions for the arrests listed above at Numbers 1 and 3. On December 9, 2002, the applicant was found guilty of the charges listed above at Number 1, and was sentenced to 30 days confinement. On May 4, 2004, the applicant was found

guilty of the charges listed above at Number 3 and was sentenced to 2 days confinement. The Texas Penal Code guidelines for charges under Section 481.121, indicate that possession of marijuana under 2 ounces, is a Class B Misdemeanor. The guidelines further indicate that Class B Misdemeanors are punishable by a term of confinement in jail not to exceed 180 days. Although the applicant may not have been required to serve more than five days in confinement for the arrest listed at Number 3, the crime is designated as a misdemeanor and is punishable by more than five days confinement. Therefore, it must be concluded that the applicant is ineligible for TPS due to his record of at least two misdemeanor convictions, detailed above. 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the application for this reason will be affirmed.

Counsel notes that the charges for the "April 7, 2004" arrest are still pending. It is noted that the Federal Bureau of Investigation (FBI) report reflects that charges were filed on April 14, 2006, for Delivery of Controlled Substance/Marijuana to Minor, and on April 21, 2006, for Theft \geq \$500 $<$ \$1,500. The applicant did not provide any evidence relating to these charges. It is noted that under Texas law, the offense of delivery of a controlled substance to a minor is classified as a second degree felony punishable by imprisonment for a term not to exceed 20 years. It is also noted that the applicant is currently in custody in El Paso, Texas, after being referred to Immigration Officers following his arrest by officers who were investigating a burglary call on August 12, 2006.

While the issue of the applicant's inadmissibility was not raised by the director, the applicant is also ineligible for TPS due to his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, due to his drug-related convictions as detailed above. Therefore, the application must also be denied for this reason. There is no waiver available for inadmissibility under this section of the Act.

Beyond the decision of the director, the applicant has failed to establish his continuous residence in the United States since December 30, 1998, and his continuous physical presence in the United States since January 5, 1999. The record contains a previous Notice to Appear, issued on October 26, 2001, at Van Horn, Texas, indicating that the applicant entered the United States without inspection at or near El Paso, Texas, on or about December 14, 2000. On his Form I-821, Application for Temporary Protected Status, and on the Form I-765, Application for Employment Authorization, the applicant certified under penalty of perjury that he had entered the United States on "12-14-00." In his most recent contact with Immigration Officers, the applicant indicated that he entered the United States without inspection on "August 15, 2000," by crossing the Rio Grande River. The record does not contain evidence reflecting the applicant's presence in the United States prior to the requisite dates for Honduran nationals under the TPS standards. Therefore, the applicant has not established that he has met the criteria described in 8 C.F.R. § 244.2(b) and (c), and the application must also be denied for these reasons.

In addition, the applicant has also failed to provide sufficient evidence to establish that this application should be accepted as a late initial registration under 8 C.F.R. § 244.2(f)(2)(iv). Although the applicant indicated that his mother was an approved TPS registrant, for reasons discussed below, the applicant has not conclusively demonstrated that [REDACTED] is, in fact, his mother, and that he is therefore eligible for late registration. The applicant submitted a Birth Certificate, issued on May 29, 2003, indicating [REDACTED] as the applicant's mother. The record also contains a statement from a Pastor, Iglesia Filadelfia, Urraco Norte, El Progreso, Yoro, [Honduras] dated March 14, 2003, listing [REDACTED] the applicant's mother, but providing a different date of birth and spelling of the middle name for the applicant. The record does not include any documentation issued prior to the applicant's arrival in the United States that verifies his parentage. In a previously submitted motion to the immigration court dated April 10,

2003, counsel had stated that the mother did not register the applicant at the time of his birth. A copy of the Form I-821, for [REDACTED] however, reflects that she also did not include the applicant among the listing of her children that she signed under penalty of perjury on August 3, 2001. For these reasons, the applicant has not conclusively established his eligibility for late initial registration under the provisions of 8 C.F.R. § 244.2(f)(2)(iv), and the application must also be denied for this reason.

Further, the applicant failed to submit a national identity document from his country of origin bearing a photograph and/or fingerprint. The birth certificate alone is insufficient to establish the applicant's identity and nationality under the provisions of 8 C.F.R. § 244.9(a)(1). Therefore, the application must also be denied for this reason.

It is noted that immigration removal proceedings that were instituted against the applicant were administratively closed on August 16, 2001, to allow the applicant to apply for TPS, and that on May 19, 2003, the Immigration Judge administratively closed removal proceedings due to the applicant's "pending TPS application." As this TPS application has now been denied, immigration removal proceedings should be reinstated.

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 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.