



U.S. Citizenship
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Services

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JAN 30 2007

FILE:

[SRC 99 184 51509]

Office: ATLANTA DISTRICT OFFICE

Date:

IN RE:

Applicant:

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the California Service Center. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Atlanta District Office. A subsequent application for re-registration was denied by the Director, California Service Center. The case currently is before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further consideration and action.

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 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).

On appeal, counsel argues that the applicant has been convicted of only one misdemeanor, and is therefore, not ineligible for TPS.

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.

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.

The record reveals the following offenses:

- (1) On July 29, 1993, the applicant was arrested by the San Francisco, California, Police Department and charged with (1) Selling and Furnishing Hashish and (2) Possession of Marijuana/Hashish For Sale.
- (2) On September 4, 2000, the applicant was arrested by the Smyrna Police department and charged with (1) Carrying a Concealed Weapon and (2) Driving Under the Influence (DUI)

On appeal, counsel argues that the applicant has been convicted of only one misdemeanor, and is therefore, not ineligible for TPS. Counsel also states that she is attempting to obtain a letter from the presiding judge to support her claim. To date, there has been no further correspondence from the applicant or counsel. Therefore, the record shall be considered complete.

The court disposition submitted by the applicant indicates that he was charged with six violations and pleaded guilty to two offenses in a negotiated plea and sentenced to twelve months and fined \$400. Counsel argues that the notation “25.00 Suspended Did Actually Have Ins” (sic) indicates that the judge chose not to impose the punishment of \$25.00 fine; therefore, the applicant has only been convicted of one misdemeanor offense.

Although the Georgia Penal Code supports counsel's argument that the applicant was only convicted of one misdemeanor, the applicant's fingerprint results indicate that the applicant was arrested on July 29, 1993 by the San Francisco, California, Police Department and charged with (1) Selling and Furnishing Hashish and (2) Possession of Marijuana/Hashish For Sale. Since there are no final court dispositions in the record regarding these alleged crimes, the AAO is unable to render a decision on how they affect his TPS application.

An alien is inadmissible if a consular officer or immigration officer knows or has reason to believe he is or has been an illicit trafficker in any such controlled substance. Section 212(a)(2)(C) of the Act.

The instructions regarding the usage of the FBI report, and the provisions of 28 C.F.R. § 50.12, state, in part:

If the information on the record is used to disqualify an applicant, the official making the determination of suitability for licensing or employment shall provide the applicant the opportunity to complete, or challenge the accuracy of, the information contained in the FBI identification record. The deciding official should not deny the license or employment based on the information in the record until the applicant has been afforded a reasonable time to correct or complete the information, or has declined to do so.

The record of proceeding, in this case, does not contain the court's charging documents and final dispositions for the applicant's arrests to establish that he was in fact convicted of the crimes listed in the FBI report. Nor is there evidence in the record that the applicant was requested to submit the court documents of all his arrests.

The case will, therefore, be remanded so that the director may accord the applicant an opportunity to submit arrest reports and the court's final dispositions of all his arrests. The director shall enter a new decision.

Although the applicant has not yet established his eligibility for Temporary Protected Status, his initial application has been reopened and is currently pending adjudication; therefore, the applicant is eligible for Temporary Treatment Benefits under 8 C.F.R. § 274a.12(c)(19).

As always in these proceedings, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The district director's decision is withdrawn, and the application is remanded for a new decision. The re-registration application is remanded for further action consistent with the director's new decision on the initial application.