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U.S. Citizenship
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SEP 20 2007

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FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date:

[EAC 99 199 50639]

[EAC 06 224 73569]

IN RE:

Applicant:

[REDACTED]

APPLICATION:

Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act (the 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (VSC), withdrew the approval of the application and denied the applicant's application for re-registration. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The applicant is a citizen of El Salvador who was granted Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (I.N.A. or the Act), 8 U.S.C. § 1254.

The director withdrew the approval of the application and denied the re-registration application because the applicant had been convicted of criminal sexual contact and contempt.

On appeal, counsel for the applicant asserts that the denial of the applicant's application was in error and that the applicant is eligible for TPS. The applicant asserts that his two convictions were merged and therefore, he only stands convicted of one crime. He also asks that his application be granted as a matter of discretion.

The director may withdraw the status of an alien granted TPS under section 244 of the Act at any time if it is determined that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. 8 C.F.R. § 244.14(a)(1).

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 designated by the Attorney General 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.
- (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.

An alien shall not be eligible for TPS under this section if the Secretary of the Department of Homeland Security (DHS) 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).

Section 244(c)(2)(B)(i) of the Act states that:

- (B) Aliens ineligible.-An alien shall not be eligible for temporary protected status under this section if the Attorney General finds that-
 - (i) the alien has been convicted of any felony or 2 or more misdemeanors committed in the United States.

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 burden of proof is on 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 Citizenship and Immigration Services (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 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 record reflects that on April 26, 2006, the applicant pleaded guilty, in the Criminal Law Division of the New Jersey Superior Court, Hudson County, New Jersey, to the following offenses:

1. One count of criminal sexual contact - 2C:14-3b (as amended from two counts of aggravated sexual assault); and,
2. One count of contempt - 2C:29-9b (as amended from one count of criminal restraint).

The judgment of conviction submitted by the applicant indicates that he was sentenced to three years probation and was given credit for 58 days spent in custody for the above-mentioned guilty pleas.

New Jersey does not classify its crimes as misdemeanors and felonies. Instead, it classifies them as crimes and disorderly persons offenses. An offense which would be called a felony in other states is called a crime. Crimes are further classified in degrees, e.g., a crime of the first degree, a crime of the second degree, etc. An offense which would be called a misdemeanor in other states is called a disorderly persons offense.

In New Jersey, a conviction under § 2C:14-3b for criminal sexual contact is a crime of the fourth degree and can result in up to 18 months imprisonment. A conviction under § 2C:29-9b for contempt is also a crime of the fourth degree and can result in up to 18 months imprisonment.

The regulations at 8 C.F.R. § 244.1 define a felony as a crime punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served. In the applicant's case, he was convicted of two crimes, each punishable by up to 18 months imprisonment. For purposes of TPS eligibility, the applicant has been convicted of two felonies, regardless of the fact that the judge in his case only sentenced him to three years probation and gave him credit for 58 days of time served.

The applicant asserts that his contempt charge was merged with his criminal sexual conduct charge so that he really only pleaded guilty to one crime. The applicant cites to a section of New Jersey law that states that "any sentence for a conviction for contempt may be served consecutively to any sentence imposed for the underlying offense." The merging of convictions for sentencing purposes does not mean that the applicant only stands convicted of one crime. The judgment of conviction submitted by the applicant indicates that he stands convicted of two separate crimes: criminal sexual conduct and contempt. Assuming that the applicant's guilty plea only resulted in the conviction of one crime, he has still been convicted of at least one felony. Conviction of any single felony makes the applicant ineligible for TPS under the specific criminal provisions for TPS applicants under Section 244(c)(2)(B)(i) of the Act. Consequently, the director's decision to withdraw the approval of the TPS application and deny the re-registration application will be affirmed.

The applicant asks that his application be approved as a matter of discretion. The applicant is ineligible for TPS due to his record of the two felony convictions detailed above. There is no discretionary waiver available to the applicant under the Act or the regulations.

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 that burden.

ORDER: The appeal is dismissed.