

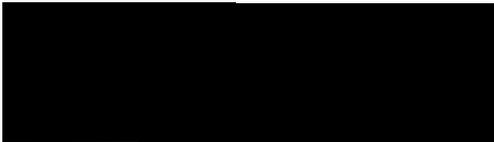
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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Services

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FILE: [REDACTED]
[SRC 99 131 51222]

Office: VERMONT SERVICE CENTER

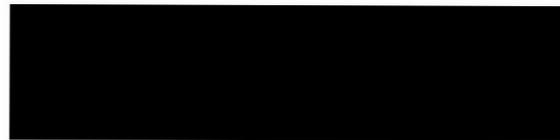
Date:

SEP 25 2009

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:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant claims to be a 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 record reveals that the applicant filed a TPS application during the initial registration period on February 10, 1999, under receipt number SRC 99 131 51222. The Director, Texas Service Center, approved that application on December 23, 1999.

The director may withdraw the status of an alien granted Temporary Protected Status 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).

The director withdrew the applicant's Temporary Protected Status because the applicant failed to submit the requested court disposition relating to his criminal record.

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. 8 C.F.R. § 244.1.

The record reveals the following offenses:

- (1) On September 17, 2006, the applicant was arrested by the Sheriff's Office in Chalmette, St. Bernard Parish, Louisiana and charged as a "Fugitive" under the Kenner Police Department [REDACTED]
- (2) On September 19, 2006, the applicant was arrested by the Kenner, Louisiana Police Department for "Following Too Closely."
- (3) On or about December 26, 2007, the applicant was arrested by the Causeway Bridge, Louisiana Police Department for "Operating a Vehicle While Intoxicated" [REDACTED] and "Public Intimidation." [REDACTED]

Pursuant to notices dated December 31, 2007, and March 12, 2008, the applicant was requested to submit the final court disposition for each of the charges detailed above. Counsel submitted court documentation regarding the above mentioned arrests. The charge of fugitive was not a conviction and although the applicant was convicted of following too closely, this was a traffic violation only. According to the court documents, the charge of operating a vehicle while intoxicated, a violation of RS 14.98, was *nolle prossed*. In regards to the public intimidation charge, counsel requested an extension of time as the applicant's felony jury trial was scheduled for April 21, 2008.

On October 23, 2008, the director withdrew temporary protected status because the applicant had "failed to include any extract of the minutes of the court or other indication of the final court disposition" for the public intimidation charge.

On appeal, counsel for the applicant provides court documentation, which reflects that on April 22, 2008, the applicant was found guilty of public intimidation, a violation of RS 14:122, a felony. The applicant was given a suspended sentence and placed on probation for two years. Counsel claims that the applicant has an appeal pending regarding his public intimidation conviction. According to counsel, even if the appeal is dismissed, the applicant was granted a suspended sentence with probation, that upon satisfactory completion of probation, the conviction is set aside pursuant to Louisiana Civil Code Article 893. Counsel equates this to an acquittal. However, contrary to counsel's contention, Section 322(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), specifically states that the amendment of the definition of conviction "shall apply to convictions and sentences entered before, on, or after the date of enactment of this Act. As the Supreme Court stated in *Landgraf v. US Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483 (1994), the principle of applying the law in effect at the time of the decision does

¹ According to the court disposition, the applicant was initially charged with this violation on December 30, 2005.

not conflict with the “presumption against retroactivity when the statute in question is unambiguous.” Concerning the definition of conviction, the unambiguous language of section 322(c) leaves no doubt that Congress intended for the amendment in section 322(a) to be applied retroactively. *Moose v. INS*, 171 F.3d 994, 1007 (5th Cir. 1999).

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, 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. Section 101(a)(48)(A) of the Act. The court documentation submitted reflects that the applicant was found guilty of the offense and the judge ordered some form of punishment to the charge above. Therefore, the applicant has been "convicted" of the felony offense for immigration purposes.

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). State rehabilitative actions that do not vacate a conviction on the merits as a result of underlying procedural or constitutional defects are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan, id.*

The applicant is ineligible for TPS because of his felony conviction. In this case, there is no evidence in the record to suggest that the conviction was overturned on account of an underlying procedural or constitutional defect in the merits of the case. *See Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002); *Matter of Pickering, id.*; *Matter of Roldan, id.*

Beyond the director's decision, it is noted that United States Citizenship and Immigration Services (USCIS) records indicate that although the applicant has submitted a copy of a birth certificate with English translation, it was not accompanied by a passport or any national identity document from the alien's country of origin bearing photo and/or fingerprint to establish his nationality and identity. 8 C.F.R. § 244.9(a)(1). Therefore, the application must be denied on this basis as well.

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.