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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



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER
[EAC 99 204 51175]
[EAC 09 142 50181 – motion]

Date: APR 01 2010

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Temporary Protected Status under Section 244 of the
Immigration and Nationality Act, 8 U.S.C. § 1254

IN 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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and motion to reconsider. The motion will be granted. The AAO will remand the matter for further action by the director.

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 withdrew TPS after determining that the applicant was ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on his convictions in New York of two misdemeanors. The AAO, in dismissing the appeal on March 5, 2009, concurred with the director's findings. On motion, counsel once again disputes these findings.

The AAO also dismissed the appeal because the applicant had failed to submit sufficient evidence to establish his continuous residence and physical presence in the United States during the requisite periods.¹ On motion, counsel provides additional evidence in an attempt to establish the applicant's continuous residence and continuous physical presence.

A motion to reconsider must state the reason for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy ... [and] must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

A motion to reopen must state the new facts to be proved at the reopened proceeding, and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

The record reflects that on November 21, 2000, the applicant pled guilty to violating PL 240.20, disorderly conduct [REDACTED], and on November 2, 2006, for violating VTL 1192.1, driving while ability impaired [REDACTED].

The first issue in this proceeding is whether New York offenses considered to be "violations" should constitute disqualifying convictions for "misdemeanors" in determining TPS eligibility under section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4.

Violations committed in the State of New York are not considered "crimes" under state law, do not constitute misdemeanors or felonies, and may not be punished by more than 15 days of imprisonment. *See* New York Penal Law § 10.00(3), (4) and (6).

Pursuant to the Memorandum for Service Center Operations and the AAO dated January 17, 2010, for purposes of the TPS statute and regulations, United States Citizenship and Immigration

¹ The AAO conducts a de novo review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 244.9.

Services (USCIS) has determined that New York violations should not be considered disqualifying misdemeanors.

The second issue is the whether the applicant has established his continuous residence and physical presence in the United States during the requisite periods. On motion, counsel provides sufficient documentation to establish the applicant's continuous residence since December 30, 1998 and continuous physical presence since January 5, 1999.²

The burden of proof is upon 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 USCIS. 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 applicant has met this burden.

The applicant has no misdemeanor convictions and there are no other known grounds of ineligibility. Therefore, the director's decision to withdraw the applicant's TPS and the AAO's decision affirming the director's finding will be withdrawn. However, the validity period of the applicant's fingerprint check has expired.

Accordingly, the case will be returned for the purpose of sending the applicant a fingerprint notification form, and affording him the opportunity to comply with its requirements. Pursuant to the memorandum issued on January 17, 2010, a new biometrics fee shall not be required in this case, as the adjudication of the applicant's appeal was placed on hold pending issuance of this guidance. Following completion of this requirement, the director will render a new decision. Should the decision be adverse, the director must give written notice setting forth the specific reasons for the denial pursuant to 8 C.F.R. § 103.3(a)(1)(i), and the applicant shall be permitted to file an appeal without fee.

ORDER: The decisions of the Director, Vermont Service Center, dated May 8, 2008, and of the AAO dated March 5, 2009, are withdrawn. The motion is granted and the matter is remanded for further action by the director.

² In the dismissing the appeal on March 5, 2009, the AAO inadvertently noted that the applicant had not provided sufficient evidence to establish his residence since February 13, 2001, and his continuous physical presence since March 9, 2001.