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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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[Redacted]

FILE:

[Redacted]

consolidated herein]
[EAC 99 190 51227]

OFFICE: Vermont Service Center

DATE: **APR 15 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

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The applicant's previously granted Temporary Protected Status was withdrawn by the Director, Vermont Service Center (VSC). The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be sustained and the case returned to the director for further action.

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

The director withdrew the applicant's TPS on the ground that the applicant did not submit final court dispositions of two driving-related offenses in the State of New York and thus failed to establish that he has not been convicted of two or more misdemeanors committed in the United States, as required to be eligible for TPS under section 244(c)(2)(B)(i) of the Act.

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. *See* 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 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 issue in this proceeding is whether the following New York State offenses should constitute disqualifying “misdemeanor” convictions in determining TPS eligibility under section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a):

- “Traffic infractions” as defined at N.Y. PENAL LAW § 10.00(2) (referencing N.Y. VEH. & TRAF. LAW § 155).¹

¹ Pursuant to section 10.00(3) of the New York State Penal Law, traffic infractions 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* N.Y. PENAL LAW, § 10.00(2)-(4) and (60); N.Y. VEH. & TRAF. LAW §§ 155, 1800(b).

The director withdrew the applicant's TPS on April 28, 2009, after the applicant failed to respond to a Notice of Intent to Withdraw Temporary Protected Status (TPS). In that Notice the applicant was requested to submit certified court documents showing the final dispositions of two vehicular charges in New York State, including (1) an arrest on July 31, 1994 for DWI (driving while intoxicated), for which he was convicted on December 15, 2000², and (2) an arrest on July 1, 2007 for DWI (driving while intoxicated), DWAI Alcohol (driving while ability impaired by alcohol), and refusal to take a breath test, which appeared to result in a conviction on the DWAI Alcohol charge. The director viewed both convictions as misdemeanor crimes.

On appeal counsel asserts that the applicant has only been convicted of one misdemeanor, that his other conviction was for a "violation" under state law, not a misdemeanor, and thus does not constitute a crime for TPS purposes.

Pursuant to the Memorandum for Service Center Operations and Administrative Appeals Office Leadership dated January 17, 2010, for purposes of the TPS statute and regulations, United States Citizenship and Immigration Services (USCIS) determines that the applicant has not been convicted of two misdemeanors for TPS purposes. Therefore, the applicant is not ineligible for TPS under section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

The burden of proof is upon the applicant to establish that he or she meets the requirements for TPS. Applicants shall submit all documentation as required in the instructions or requested by USCIS. *See* 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. *See* 8 C.F.R. § 244.9(b). The applicant has met this burden.

The record does not reflect any grounds that would bar the applicant from receiving TPS. As there are no other known grounds of ineligibility; the director's decision will be withdrawn. However, the validity period of the applicant's fingerprint check has expired.

Accordingly, the director shall send the applicant a fingerprint notification form, and afford 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 applicant's appeal is sustained. The case is returned to the director for appropriate action and decision consistent with the foregoing.

² In her brief, counsel inadvertently made reference to a violation of Minnesota law. The applicant was arrested by the Mineola County, New York Police for DWAI, an infraction under New York law.