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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



U.S. Citizenship
and Immigration
Services

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FILE

Office: VERMONT SERVICE CENTER

Date: APR 22 2010

[EAC 07 162 50413, appeal]

[LIN 99 186 50008]

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 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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status (TPS) was withdrawn by the Director, Vermont Service Center (VSC), and is now before the Administrative Appeals Office on appeal.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

The applicant is stated to be a native and citizen of Honduras who was granted TPS on May 10, 2000. The director subsequently withdrew the applicant's status on April 3, 2007, because the applicant had been convicted of a particularly serious crime and that he constitutes a danger to the community in the United States.

On appeal, counsel states:

Applicant [REDACTED] appeals the withdrawal of his Temporary Protected Status. Applicant contends that the finding that "having been convicted of a particularly serious crime [he] constitutes a danger to the community of the United States" was error. Applicant contends that the Service's errors included, but were not limited to, use of material beyond the statutory definition of applicant's crime and use of material from beyond applicant's "record of conviction" in reaching its conclusion.

Counsel further states that the applicant has only one misdemeanor conviction and therefore it should not be considered a particularly serious crime, especially when considering that there was no weapon and the conviction was for attempted assault.

U.S. Citizenship and Immigration Services (USCIS) may withdraw TPS if the alien was not eligible at the time the status was granted, or if he or she becomes ineligible for TPS. 8 C.F.R. § 244.14(a)(1).

An alien shall not be eligible for TPS if the Attorney General finds that the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States. Sections 244(c)(2)(B)(ii) and 208(b)(2)(A)(ii) of the Immigration and Nationality Act (the Act).

The term "particularly serious crime" is not statutorily defined. However, the Board of Immigration Appeals (BIA) provided significant guidance in *in re Frentescu*, 18 I. & N. Dec. 244 (BIA 1982). The BIA explained that "[w]hile there are crimes which, on their face, are 'particularly serious crimes' or clearly are not 'particularly serious crimes,' the record in most proceedings will have to be analyzed on a case-by-case basis." *Id.* at 247. The BIA explained that in most cases, determining whether a crime is particularly serious requires a case-by-case analysis, using "such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community." *Id.* at 247.

The director found the applicant had been convicted of a particularly serious crime and was, therefore, ineligible for TPS pursuant to Sections 244(c)(2)(B)(ii) and 208(b)(2)(A)(ii) of the Act. However, the applicant's conviction is not particularly serious on its face and the director failed to conduct a case-specific analysis of the applicant's conviction pursuant to the criteria outlined in *Frentescu*. Therefore, the AAO will review the issue on a *de novo* basis. 5 U.S.C. 557(b) ("On

appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The record reveals that on May 19, 2005, the applicant was convicted by a Judge in the Superior Court of the State of Washington, in Clark County, of third degree assault with criminal negligence Revised Code of Washington (RCW) 9A.36.031(1)(f) and RCW 9A.28.20(3)(d) (a gross misdemeanor when the crime attempted is a class C felony. He was sentenced to serve 364 days (the maximum term was one year) in the Clark County Jail (334 days of the sentence were suspended and he was given seven days credit for time served) and ordered to pay a \$5,000 fine. He was also directed to secure an appointment with the Vancouver Guidance Clinic to begin the sex offender evaluation process within two weeks of his release from confinement and to follow their rules and recommendations thereafter.

On appeal, the applicant contends that the Service's errors included, but were not limited to, use of material beyond the statutory definition of the applicant's crime and use of material from beyond the applicant's "record of conviction" in reaching its conclusion. Counsel states that as the applicant has only one misdemeanor conviction and it should not be considered a particularly serious crime, especially, when considering that there was no weapon and the conviction was for attempted assault.

As stated above, the determination of whether a crime is considered particularly serious involves a case-specific analysis pursuant to *Frentescu*. Since this analysis was not performed by the director, it will be conducted in this decision:

Nature of the offense. Regardless of the initial charges that were filed, there is no authority for relying upon dismissed counts to be considered in determining whether a specific crime is a particularly serious one. The record reveals that the applicant was convicted of a single charge of attempted assault in the third degree, a misdemeanor.

Circumstances and underlying facts. While the court records reveal that the applicant was referred for a sex offender evaluation, the record also contains a declaration from the Prosecuting Attorney who prosecuted the applicant's case. The Prosecutor affirmed that the crime was not "a sex offense" and that "sexual motivation" was not an element of the crime.

Type of sentence imposed. As stated above, the applicant was sentenced to incarceration for a period of 364 days, with 334 days suspended and credit for seven days served. For the remaining 23 days of his sentence, the applicant was granted partial confinement served as work or education release.

The offense of attempted assault in the third degree, on its face, is clearly not particularly serious. *Frentescu* at 247. Moreover, the nature of the conviction, the length of the sentence imposed and the circumstances under which this particular crime occurred do not support a conclusion that the

applicant was convicted of a particularly serious crime or that he will be a danger to the community. The applicant is not ineligible for TPS due to his conviction. Sections 244(c)(2)(B)(ii) and 208(b)(2)(A)(ii) of the Immigration and Nationality Act (the Act).

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 record does not reflect any grounds that would bar the applicant from receiving TPS. There are no other known grounds of ineligibility; consequently, the director's decision to withdraw TPS on this ground will be withdrawn. However, the validity period of the applicant's fingerprint check has expired.

Accordingly, the case is remanded for the purpose of sending the applicant a fingerprint notification form, and affording him the opportunity to comply with its requirements. Thereafter, 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 case is remanded for appropriate action and decision consistent with the foregoing.