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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

Date: **MAY 06 2010**

[EAC 99 187 51068]

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 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 Director, Vermont Service Center (VSC), withdrew approval of the initial application. The matter is now appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The applicant is a native and citizen of Honduras who was granted Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. §1254 on November 1, 1999.

The director withdrew the approval of the application, finding that the applicant was no longer eligible for TPS because he had been convicted of sexual misconduct under New York Penal Law (PL) § 130.20. The director determined that the applicant's conviction for sexual misconduct was a conviction for rape, and, thus, an aggravated felony under section 101(a)(43)(A) of the Act. Then, pursuant to section 244(c)(2) of the Act, the director found the applicant ineligible for TPS as an alien described in § 208(b)(2)(A), who, having been convicted of a particularly serious crime, constitutes a danger to society.

On appeal, counsel for the applicant asserts that the applicant's conviction under PL § 130.20 is not an aggravated felony because the applicant did not plead guilty to the offense of sexual abuse of a minor, nor does PL § 130.20 include any language referring to sexual abuse of a minor. Counsel asserts that the fact that the indictment alleges that the victim was a minor cannot be considered, because the prosecutor did not prove this, and, the applicant did not plead guilty to "sexual abuse of a minor".

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).

An alien shall not be eligible for TPS if the Attorney General [now the Secretary of Homeland Security (Secretary)] 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). For purposes of this clause, an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime. See section 208(b)(2)(B)(i) of the Act.

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).

On August 9, 2004, in the Nassau County Court House, in Mineola, New York, he pleaded guilty to one count of sexual misconduct, under New York PL § 130.20.

Under New York PL § 130.20, a person is guilty of sexual misconduct when:

1. He or she engages in sexual intercourse with another person without such person's consent; or
2. He or she engages in deviate sexual intercourse with another person without such person's consent; or
3. He or she engages in sexual conduct with an animal or a dead human body.

In New York, a conviction for sexual misconduct is a class A misdemeanor and is punishable by up to one year imprisonment. The applicant was not sentenced to any jail time, but was sentenced to six years probation and a three-year order of protection. He was also ordered to register as a sex offender.

On January 30, 2007, the director withdrew the approval of the application, finding that the applicant was no longer eligible for TPS because he had been convicted of sexual misconduct under New York Penal Law (PL) § 130.20. The director determined that the applicant's conviction for sexual misconduct (involving a minor victim under the age of 17 years old) was an aggravated felony under section 101(a)(43)(A) of the Act, which includes rape. Then, pursuant to § 244(c)(2) of the Act, the director found the applicant ineligible for TPS as an alien described in section 208(b)(2)(A) of the Act, who, having been convicted of a particularly serious crime, constitutes a danger to society.

On appeal, counsel for the applicant asserts that the applicant's conviction under PL § 130.20 is not an aggravated felony because the applicant did not plead guilty to the offense of sexual abuse of a minor, nor does PL § 130.20 include any language referring to sexual abuse of a minor. Counsel asserts that the fact that the indictment alleges that the victim was a minor cannot be considered because the prosecutor did not prove this and because the applicant did not plead guilty to sexual abuse of a minor.

The section of the New York statute under which the applicant was convicted is divisible, meaning it contains three distinct acts an individual may have engaged in: sexual intercourse without a person's consent; deviate sexual intercourse with another person without such person's consent; or, sexual conduct with an animal or a dead human body. Looking at the final disposition and the statute, by themselves, one could not determine conclusively that the applicant's conviction for sexual misconduct is a conviction for rape, because it includes behavior that would constitute rape, i.e., engaging in sexual

intercourse or deviate sexual intercourse with another person without such person's consent; and, behavior, that, while offensive, would not necessarily constitute rape, i.e., engaging in sexual conduct with an animal or a dead human body.

Counsel for the applicant is correct that we cannot look to the first count of the indictment, rape in the third degree, and conclude that the second count of the indictment involved sexual intercourse with a person under the age of seventeen. Counsel is also correct that the offense of sexual misconduct makes no reference to age. Counsel, however, seems to have mistakenly believed that the director found the applicant ineligible for TPS due to a conviction for sexual abuse of a minor. While the director referred to the victim's age several times, the director did not find the applicant ineligible for TPS due to a conviction for "sexual abuse of a minor" under section 101(a)(43)(A) of the Act. Instead, the director referenced the crime of "rape" also listed in section 101(a)(43)(A) of the Act.

In the analysis of whether a certain conviction is a particularly serious crime or not, when the conviction involves a divisible statute, it is permissible to look at the record of conviction to determine which act the applicant was convicted of engaging in. We can, then, look at the second count in the indictment to determine if the applicant's conviction involved sexual intercourse with a person without such person's consent because the applicant pleaded guilty to sexual misconduct.

The indictment in this case reveals that the District Attorney accused the applicant, under the second count, of sexual misconduct for having engaged in sexual intercourse with a person without such person's consent. The applicant subsequently pleaded guilty to that count of sexual misconduct. Therefore, the applicant's conviction for sexual misconduct was for engaging in sexual intercourse with a person without such person's consent, not for engaging in sexual conduct with an animal or a dead human body.

The term rape is not defined in section 101(a)(43)(A) of the Act. Engaging "in sexual intercourse with a person, without such person's consent," however, constitutes rape. *See United States v. Beltran-Mungia*, 489 F.3d 1042 (9th Cir. 2007) (holding that a particular crime fit within a generic, contemporary definition of rape, which can, but does not necessarily, include an element of physical force beyond that required for penetration).

The offense of sexual misconduct, pursuant to New York PL § 130.20 constitutes rape and is therefore an aggravated felony under section 101(a)(43)(A) of the Act. Although the applicant's conviction for sexual misconduct is a class A misdemeanor under New York State law, it nevertheless constitutes an aggravated felony under section 101(a)(43)(A) of the Act. *See In Re Small*, 23 I&N Dec. 448 (BIA 2002) (finding that sexual abuse in the second degree, in violation of New York PL 130.60(2), a class A misdemeanor under state law, constitutes an aggravated felony under section 101(a)(43)(A); and, *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (finding that a crime designated as a misdemeanor under state law, may nevertheless constitute an aggravated felony for purposes of section 101(a)(43)(A) of the Act.

As stated above, an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime. The applicant is ineligible for TPS due to his conviction. Sections 244(c)(2)(B)(ii) and 208(b)(2)(A)(ii) of the Act. Consequently, the director's decision to withdraw TPS and deny the re-registration application will be affirmed.

An alien applying for TPS has the burden of proving that he or she meets the requirements listed above and is otherwise eligible under the provisions of section 244 of the Act. The applicant has not met this burden.

ORDER: The appeal is dismissed.