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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



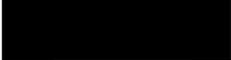
U.S. Citizenship
and Immigration
Services

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FILE:



OFFICE: VERMONT SERVICE CENTER

DATE **MAY 06 2010**

[EAC 01 172 51066]

IN RE:

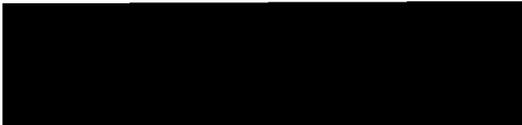
Applicant:



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.

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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

The applicant claims to be a native and citizen of El Salvador 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 the applicant's TPS because he found the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to his conviction of a crime involving moral turpitude.

On appeal, counsel for the applicant asserts that the applicant is not a danger to the community, and that his TPS should be granted.

U.S. Citizenship and Immigration Services 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 [now Secretary, Department of Homeland Security] 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 December 15, 2005, the applicant pled guilty to Forcible Touching, New York statute § 130.52, in the District Court of Nassau County, New York. [REDACTED]. The applicant was placed on probation for a period of six years.

On appeal, the applicant asks that his TPS be restored.

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 offense of forcible touching, on its face, is clearly not particularly serious. *Frentescu*, 18 I. & N. Dec. 244 (BIA 1982). Therefore, 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). Consequently, the director's decision to withdraw TPS and deny the re-registration application will be withdrawn.

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 United States Citizenship and Immigration Services (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; however, the validity period of the applicant's fingerprint check has expired.

Accordingly, the case is returned to the director for the purpose of sending the applicant a fingerprint notification form, and affording him the opportunity to comply with its requirements.

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 met this burden.

ORDER: The appeal is sustained and the case returned to the director for further processing.