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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

**PUBLIC COPY**

M1

[REDACTED]

FILE:

[REDACTED]

OFFICE:

[REDACTED]

DATE:

IN RE:

Applicant:

[REDACTED]

**NOV 30 2010**

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the [REDACTED] Service Center. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the [REDACTED] Service Center by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The application was denied by the Director, [REDACTED] Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant claims to be a native and citizen of [REDACTED] 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 denied the application because the applicant had been convicted of felony convictions in the United States.

On appeal, counsel asserts that the applicant's non-moving traffic violations "should not disqualify him from TPS pursuant to USCIS's memorandum providing guidance regarding adjudication of TPS applications and administrative appeals incases involving aliens convicted of certain [REDACTED] traffic infractions or violations." Counsel asserts that the applicant has filed a motion to vacate his felony littering conviction based on ineffective assistance of counsel. Counsel requests that an abeyance of adjudication until a final ruling against motion to vacate has been issued.

An alien shall not be eligible for TPS 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).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception 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 actually served. Under this exception, for purposes of 8 C.F.R. § 244 of the Act, the crime shall be treated as a misdemeanor. 8 C.F.R. § 244.1.

"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. 8 C.F.R. § 244.1.

The Federal Bureau of Investigations report dated April 12, 2010, reflects the applicant's criminal history in the state of [REDACTED] as follows:

1. On January 22, 2004, the applicant was arrested by the [REDACTED] Police Department for driving while license is suspended with knowledge, a violation of [REDACTED] Statute section 322.34(2), a misdemeanor.
2. On December 9, 2004, the applicant was arrested by the [REDACTED] Police Department for driving while license is suspended – habitual offender, a violation of [REDACTED] Statue section 322.34(5), a felony of the third degree.

3. On June 6, 2005, that applicant was arrested by the [REDACTED] Police Department for driving while license is suspended – habitual offender, a violation of [REDACTED] Statute section 322.34(5), a felony of the third degree, and probation violation- driving while license is suspended - habitual offender.
4. On December 12, 2005, the applicant was arrested by the [REDACTED] Police Department under a bench warrant – no valid driver’s license.
5. On May 16, 2007, the applicant was arrested by the [REDACTED] Police Department for [REDACTED] litter law, a violation of [REDACTED] Statute section 403.413(6)(c), a felony of the third degree.
6. On August 6, 2008, the applicant was arrested under warrant by the [REDACTED] Police Department for [REDACTED] litter law, a violation of [REDACTED] Statute section 403.413(6)(c), a felony of the third degree. This arrest relates to the applicant’s arrest on May 16, 2007.
7. On February 27, 2009, the applicant was arrested under the alias [REDACTED] by the [REDACTED] Department of Law Enforcement Tribe of [REDACTED] for grand theft, a violation of [REDACTED] State statute 812.014(2)(c)(1), a felony of the third degree.

On May 5, 2010, a notice was issued which requested the applicant to provide certified court dispositions of all arrests. The applicant, in response, submitted:

- For number one, certified court documentation indicating that on June 8, 2010, the applicant pled guilty to violating [REDACTED] Statute section 322.34(2), a misdemeanor. The applicant was ordered to pay a fine. Case no. [REDACTED]
- For number two, certified court documentation indicating that on July 15, 2005, the applicant pled guilty to violating [REDACTED] Statute section 322.34(5), a felony of the third degree. The applicant was ordered to serve 30 days in jail and pay a fine. Case no. [REDACTED]
- For number three, certified court documentation indicating that on July 12, 2005, the applicant pled guilty to violating [REDACTED] Statute section 322.34(5), a felony of the third degree. The applicant was ordered to serve 30 days in jail and pay a fine. Case no. [REDACTED]
- For number five, certified court documentation indicating that on August 29, 2008, the applicant pled guilty to violating [REDACTED] Statute section 403.413(6)(c), a felony of the third degree. Adjudication of guilt was withheld and the applicant was ordered to pay a fine and his sentence was suspended. Case no. [REDACTED]
- For number seven, the police report and complaint affidavit from the [REDACTED] Police Department.

On appeal, counsel asserts that the applicant is seeking a motion to vacate the felony conviction in number four due to ineffective assistance of counsel. Counsel asserts that the conviction entered was contrary to *Padilla v. Kentucky*, 130 S. Ct. 2473 (U.S 2010) as the applicant was not advised of the immigration consequences of a guilty plea.

Counsel cites no statute or regulation that compels the AAO to hold a decision in abeyance while the Circuit Court renders its decision. As such, counsel's request is denied. In the instant case, counsel has not provided any credible evidence to support his assertion that the applicant had not been advised of the possible immigration consequences of a guilty plea by either his counsel or the trial court. The assertion of counsel does not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO concludes that the felony conviction of August 29, 2008, continues to effect immigration consequences.

Counsel cites a memorandum issued by U.S. Citizenship and Immigration Services (USCIS) on January 17, 2010,<sup>1</sup> to support her argument that the applicant's nonmoving traffic violations in ██████ should not disqualify him from receiving TPS. Counsel's assertion is without merit as the memorandum specifically pertains to traffic infractions and violations committed in the state of ██████. The state of ██████ has not classified any of the above violations to be infractions.

██████ Statute section 322.34(5) provides that any person whose driver's license has been revoked pursuant to section 322.264 (habitual offender) and who drives any motor vehicle upon the highways of this state while such license is revoked is guilty of a felony of the third degree, punishable as provided in sections 775.082, 775.083, or 775.084.

The maximum penalty for a conviction of a felony of the third degree is imprisonment for a period of not more than five years or by a fine of not more than \$5000, or by both such fine and imprisonment. See ██████ Statute sections 775.082(3)(d) and 775.083(1)(c).

As cited above, a felony is any offense that is punishable by imprisonment for a term of more than one year, *regardless of the term such alien actually served, if any*. USCIS may only look to the judicial records to determine whether the person has been convicted of the crime, and may not look behind the conviction to reach an independent determination concerning guilt or innocence. *Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991).

The applicant is ineligible for TPS due to his felony convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). There is no waiver available, even for humanitarian reasons, of the requirements stated above. Consequently, the director's decision to deny the application for this reason will be affirmed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043

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<sup>1</sup>The memorandum, issued by Associate Director, Service Center Operations, and the Chief, AAO, determined that offenses described as violations and traffic infractions in ██████ should not be considered disqualifying misdemeanors.

(E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The applicant is also ineligible for TPS because of his failure to provide the final court disposition for his arrest on February 27, 2009, necessary for the adjudication of his application. 8 C.F.R. § 244.9(a). Consequently, the application will be also denied for this reason.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. An alien applying for TPS 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 failed to meet this burden.

While not the basis for the dismissal of this appeal, it is noted that the record reflects that a Form I-589, Application for Asylum and for Withholding of Removal, was filed on September 2, 1994. A Form I-862, Notice to Appear, was issued and served on the applicant on June 28, 2007. A removal hearing was held on July 22, 2008, and the applicant was ordered removed *in absentia*. The applicant's application for relief from removal was deemed abandoned and denied for lack of prosecution. On November 24, 2009, the applicant filed a motion to reopen before the immigration court, which was denied on January 4, 2010. On November 25, 2009, a Form I-220B, Order of Supervision, was issued that appears to be still in effect.

**ORDER:** The appeal is dismissed.