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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

M₁

[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: OCT 01 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:

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 Vermont 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 Vermont Service Center by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. 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, Vermont Service Center. A subsequent appeal was dismissed by the Director, Administrative Appeals Office. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen and reconsider. The motion to reopen will be sustained and the case remanded for further action.

The applicant is 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 denied the application because he found the applicant had been convicted of two or more New York State “violations,” as defined by N.Y. PENAL Law §10.00(3).

The appeal from the director's decision was dismissed on September 25, 2006, after the AAO also concluded that the applicant had failed to establish his eligibility for TPS. On motion, the applicant reasserts his claim of eligibility for TPS.

A motion to reopen or reconsider must be filed within thirty days of the underlying decision, except that failure to file during this period may be excused at the Service's discretion when the applicant has demonstrated that the delay was reasonable and beyond the control of the applicant. 8 C.F.R. § 103.5(a)(1)(i). A motion to reconsider must state the reason for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy ... [and] must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The applicant's motion consists of a statement from the applicant in which she states that her convictions were for violations and not misdemeanors.

The issue in this proceeding is whether the following New York offenses should constitute disqualifying convictions for “misdemeanors” in determining TPS eligibility under section 244(c)(2)(B)(i) of the Immigration and Nationality Act (INA) and 8 C.F.R. § 244.4:

- Traffic infraction,” as defined at N.Y. PENAL LAW § 10.00(2)(referencing N.Y.VEH.&TRAF.LAW § 155);
- “Violations,” as defined at N.Y. PENAL LAW § 10.00(3); and
- Certain minor offenses that are described as “violations” under certain local New York laws.¹

¹ Pursuant to section 10.00(3) of the New York State Penal Law, violations and 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 (6); N.Y. VEH. & TRAF. LAW §§ 155, 1800(b).

The director denied the application on September 25, 2006 , after determining that the applicant was ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on his convictions in New York of two misdemeanors.

On motion, the applicant furnished a copy of the January 17, 2010 USCIS memorandum that provides guidance for adjudication of TPS applications and administrative appeals involving aliens convicted of certain minor New York traffic infractions or violations.

Pursuant to the Memorandum for Service Center Operations and Administrative Appeals Office dated January 17, 2010, for purposes of the TPS statute and regulations, United States Citizenship and Immigration Services (USCIS) has determined that these New York offenses should not be considered disqualifying misdemeanors. 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 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. 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 case is remanded for the purpose of sending the applicant a fingerprint notification form, and affording him the opportunity to comply with its requirements. 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 and the case is remanded for appropriate action and decision consistent with the foregoing.