

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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**



MI

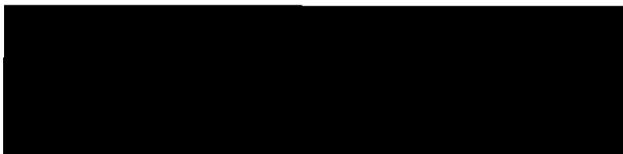
FILE:  OFFICE: CALIFORNIA SERVICE CENTER DATE:

SEP 22 2010

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:

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 California 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 California 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, California 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 Haiti 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 two misdemeanors and a felony in the United States.

On appeal, counsel for the applicant asserts that the convictions were obtained through a guilty plea by the applicant on advice of her counsel. Counsel asserts that the applicant, however, was not advised of the immigration consequences.

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.

At the time the applicant filed her TPS application, she provided court documentation, which reflects that on October 27, 2003, the applicant was arrested by the Sheriff's Office in Orange County, Florida and was subsequently charged with larceny, resisting officer without violence and resisting merchandise recovery. On [REDACTED], the applicant pled guilty to violating Florida Statute, 812.014(2)(c)(1), grand theft, a felony in the third degree, and Florida Statute 812.015(6), resisting merchandise recovery, a misdemeanor of the first degree. Adjudication of guilt was withheld and the applicant was sentenced to serve three days in jail, ordered to pay a fine and placed on probation for 18 months. Case no. [REDACTED]

The director's finding that the applicant had been convicted of two misdemeanors (resisting officer without violence and resisting merchandise recovery) is not supported by the record. The court documentation indicates that a *nolle prosequi* was entered for the charge of resisting an

officer without violence. Therefore, the director's finding that the applicant had been convicted of two misdemeanors will be withdrawn.

On appeal, counsel asserts, in pertinent part:

However, [the applicant] should be eligible as a result of the United States Supreme Court recent decision in *Padilla v. Kentucky*, (March 31, 2010) holding that "counsel must inform a client whether his plea carries a risk of deportation," because "as a matter of federal law, deportation is an integral part –indeed, sometimes the most important part–of the penalty that may be imposed on noncitizens defendants who plead guilty to specified crimes."

The Board of Immigration Appeals also held that a conviction vacated for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes. *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006).

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 her 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 and misdemeanor (resisting merchandise recovery) convictions continue to effect immigration consequences.

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Act.

In the instant case, the court documentation submitted reflects that the applicant pled guilty to violating Fla. Statutes 812.014(2)(c)(1) and 812.015(6), and the judge ordered some form of punishment to the charges above. Therefore, the applicant has been "convicted" of these offenses for immigration purposes.

The applicant is ineligible for TPS due to her felony conviction. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the application for this reason will be affirmed.

While not the basis for the dismissal of the appeal, it is noted that the record reflects that on September 28, 2000, a Form I-862, Notice to Appear, was served on the applicant. A removal

hearing was held on March 9, 2001, and the applicant was removed *in absentia*. On the same date, a Form I-205, Warrant of Removal/Deportation, was issued.

**ORDER:** The appeal is dismissed.