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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

M1

[redacted]

DATE: JUL 27 2011 Office: CALIFORNIA SERVICE CENTER FILE [redacted]

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 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 $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, 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 a felony in the United States.

On appeal, counsel asserts that the applicant was sentenced to probation for his crimes, and therefore, his convictions are neither a felony nor a misdemeanor. Counsel citing *U.S. v. Gonzalez-Coronado*, 419 F. 3d 1090, 1093-94 (10th Cir. 2005) and *US. V. Guzman-Bera*, 216 F.3d 1019 (11th Cir. 2000) asserts that a sentence of probation is not considered a sentence to confinement or imprisonment.

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 record contains court documents indicating that on July 19, 1995, the applicant was charged in the 17th Judicial Circuit Court of Florida with aggravated assault, a violation of Florida Statute 784.011, a felony of the third degree, and battery, a violation of Florida Statute 784.03(1), a misdemeanor of the first degree. On January 8, 1997, the applicant pled *nolo contendere* to both offenses. Adjudication of guilt was withheld and the applicant was ordered to pay a fine on each count, enroll and successfully complete a program at a family service agency and was placed on probation for one year. [redacted]

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. The maximum penalty for a conviction of a misdemeanor of the first degree is

imprisonment for a period of not more than a year or by a fine of not more than $1000, or by both such fine and imprisonment. *See* Florida Statute sections 775.082 and 775.083.

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, 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.

The court documentation reflects that the applicant pled *nolo contendere* to the offenses and the judge ordered some form of punishment to each charge and a restraint on the applicant's liberty. 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.* Therefore, the applicant has been "convicted" of the offenses for immigration purposes.

The AAO has reviewed counsel's brief on appeal and the authorities cited therein, and concludes that the misdemeanor and felony convictions continue to affect immigration consequences.

The applicant is ineligible for TPS due to his felony conviction. 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 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.

Finally, while not the basis for the dismissal of the appeal, it is noted on July 21, 1997, a Form I-862, Notice to Appear, was issued and served on the applicant on July 23, 1997. On January 12, 1998, a removal hearing was held and the applicant was ordered removed from the United States. The applicant appealed the immigration judge's decision to the Board of Immigration Appeals (BIA). On September 10, 2001, the BIA dismissed the appeal.

ORDER: The appeal is dismissed.