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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



M,

DATE: **JUN 08 2011** Office: CALIFORNIA SERVICE CENTER

FILE:

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: Self-represented

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,

for 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, the applicant asserts that he has an application for post conviction relief pending before the criminal court in Naples, Florida. The applicant requests that his application be reconsidered.

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.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC § 802). Section 212(a)(2)(A)(i)(II) of the Act.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record contains the following documents relating to the applicant's criminal history:

1. Court documentation in Case no. [REDACTED] from the Circuit Court of the state of Florida for Collier County, which reflects that on February 12, 1997, the

applicant was arrested and charged with sale/delivery/manufacture controlled substance and possession with intent to sell, deliver, manufacture controlled substance. On July 8, 1997, the applicant pled *nolo contendere* to possession with intent to sell or deliver a controlled substance – cocaine, a violation of Florida Statute 893.13(1)(a), a felony in the second degree. Adjudication of guilt was withheld and the applicant was placed on probation for one year and ordered to pay a fine/court cost. A *nolle prosequi* was entered for the charge of sale/delivery/manufacture of a controlled substance. On February 5, 1998, the applicant violated his probation. On March 20, 1998, the applicant pled *nolo contendere* to violating his probation. The applicant was placed on community control for six months and on probation for one year.

2. Court documentation in Case no. [REDACTED] from the County Court of Collier County, Florida, which indicates that on May 29, 2007, the applicant was arrested by the Sheriff's Office of Collier County for driving while license is suspended/revoked, a violation of Florida Statute 322.34(2)(a), a misdemeanor of the second degree. On June 20, 2007, the applicant was convicted of this offense. The applicant was sentenced to serve ten days in jail, placed on probation for six months and was ordered to pay a fine.
3. Court documentation in Case no. [REDACTED] from the County Court, Twentieth Judicial Circuit for Collier County, Florida, which indicates on or about March 29, 1996, the applicant was arrested and charged with driving while license is suspended/revoked, a violation of Florida Statute 322.34, a misdemeanor of the second degree. On April 29, 1996, the applicant pled no contest to the charge.
4. A Federal Bureau of Investigation report dated July 8, 2010, which reflects that on January 21, 2004, the applicant was arrested by the Fort Myers Police Department of Florida and charged with two counts of fraud impersonation/false ID given to law enforcement officer, a violation of Florida Statute 901.36(1), a misdemeanor of the first degree, and driving while license expired, a violation of Florida Statute 322.03(5), a misdemeanor of the second degree. It appears from the FBI report, that the applicant was convicted in the Lee County Court of one count of violating Florida Statute 901.36(1) in Case no. [REDACTED]
5. A booking report dated May 20, 1995 and a certified letter dated July 9, 2007, from the Sheriff's Office of Collier County, Florida, which indicate that the applicant was arrested on May 20, 1995, for driving while license is suspended/revoked. The final outcome of this arrest was not made available to U.S. Citizenship and Immigration Services (USCIS).

On appeal, the applicant asserts, "I filed a motion with the court in Florida because the lawyer that helped me with that case did not advise me that I would have such a problem with

immigration.”¹ However, the applicant has not provided any credible evidence to support his assertion that he had not been advised of the possible immigration consequences of a plea by either his counsel or the trial court. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The AAO concludes that the felony conviction continues to effect 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 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 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th 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).

Section 101(a)(43)(B) of the Act states the term “aggravated felony” means illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substance Act), including drug trafficking crime (as defined in section 924(c) of title 18, United States Code). The applicant is also ineligible for TPS because his conviction for drug trafficking constitutes an aggravated felony under section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B). The applicant is also ineligible for TPS due to his two misdemeanor convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). The applicant is also inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to his drug-related conviction.

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 the appeal, it is noted that the record reflects that the applicant's Form I-589, Application for Asylum and Withholding of Removal, was filed on December 16, 1994. A Form I-862, Notice to Appear, was issued and served on the applicant on July 17, 2007. A removal hearing was held and the applicant was ordered removed from the

¹ The applicant appears to be relying on *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006), which 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, and on *Padilla v. Kentucky*, 130 S. Ct. 1473 (U.S. 2010), which held that counsel must inform a client whether his plea carries a risk of deportation.

United States on July 22, 2009. The applicant appealed the immigration judge's decision to the Board of Immigration Appeals (BIA). On April 14, 2010, the BIA dismissed the appeal.

ORDER: The appeal is dismissed.