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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

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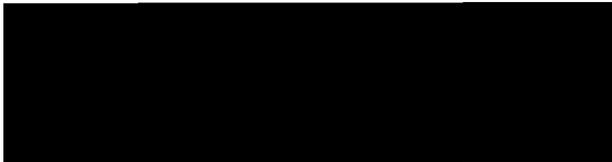
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DATE: Office: NEBRASKA SERVICE CENTER FILE: 
MAY 12 2011

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:

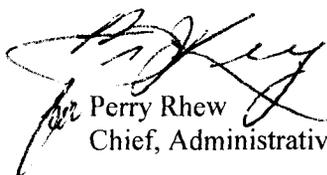


INSTRUCTIONS:

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 Nebraska 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 Nebraska 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, Nebraska 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, "a VTL offense of the type that the movant was deemed convicted of, was not contemplated by the legislature to preclude and bar such movant or those similarly situated, from receiving Temporary Protected Status." Counsel asserts that at the time of the applicant's criminal pleas, he was not advised by his then counsel that such pleas might result in his eventual deportation.

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

The Federal Bureau of Investigation report dated September 15, 2010, reflects the following offenses in the state of New York:

1. On May 27, 1998, the applicant was arrested by the New York Police Department for aggravated unlicensed operator, unlicensed driver and overtake a school bus.
2. On November 11, 2005, the applicant was arrested by the New York Police Department for aggravated unlicensed operation of motor vehicle.

On October 1, 2010, the applicant was requested to submit certified judgment and conviction documents from the courts for all arrests. The applicant, in response, submitted:

- Court documentation in Docket no. [REDACTED] from the Kings County Criminal Court of the City of New York, which reflects that on May 28, 1998, the applicant pled guilty to violating VTL 511.1, aggravated unlicensed operation of a motor vehicle in the third degree, a misdemeanor. The applicant was sentenced to serve 30 days and ordered to pay a fine.
- Court documentation in Docket no. [REDACTED] from the Kings County Supreme Court of the State of New York, which reflects that June 30, 2000, the applicant was convicted of violating VTL 511.3, aggravated unlicensed operation of a motor vehicle in the first degree, a Class E felony. The applicant was ordered to pay a fine and was placed on probation for five years.

On appeal, counsel asserts that the director failed to take into consideration that “the purported objectionable offense” occurred more than 10 years prior to the director’s determination. There is no time limitation, however, on the provision in section 244 of the Act that renders an applicant ineligible for TPS if he has been convicted of a felony or two misdemeanors in the United States.

Counsel citing *Padilla v. Kentucky*, 130 S. Ct. 2473 (U.S 2010) asserts that the applicant was not advised of the immigration consequences of a guilty plea.

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 either by 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 misdemeanor and felony convictions continue to effect immigration consequences.

Counsel asserts that the applicant had served in the United States Army and National Guard from 1985 to 1993, “and as such, same should have constituted mitigating and exceptional circumstances for purposes of being granted Temporary Protected Status.”

Counsel, however, cites no regulation or statute that compels the director to approve a TPS application where eligibility has not been established. It is noted that the record reflects that during the timeframe (September 11, 1987) the applicant was serving in the United States military, he filed a Form I-687, Application for Status as Temporary Resident, under section

245A of the Act. On December 9, 1987, the applicant was granted temporary resident status. On March 24, 1995, the applicant's Form I-698, Application to Adjust Status from Temporary to Permanent Resident, was denied because the applicant had filed the form subsequent to the 43-month eligibility period. On June 25, 1995, the Director, Vermont Service Center, terminated the applicant's temporary resident status because the applicant failed to file the Form I-698 within the 43-month application period. The applicant filed a Notice of Appeal, Form I-694, which was rejected as improperly filed on April 26, 1996. In a separate proceeding, the applicant, on October 18, 1988, filed a Form I-485, Application for Permanent Residence, under alien registration number [REDACTED]. On February 6, 1989, the Form I-485 was denied as the applicant failed to submit additional document in support of the application.

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.

ORDER: The appeal is dismissed.

¹ Cuban/Haitian Adjustment Act under section 202 of the Immigrant Reform and Control Act of 1986, Public Law 99-603 (November 6, 1986).