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U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

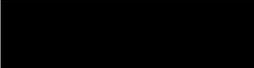


U.S. Citizenship
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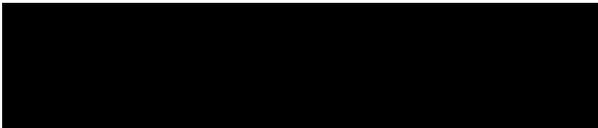


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DATE: Office: VERMONT SERVICE CENTER

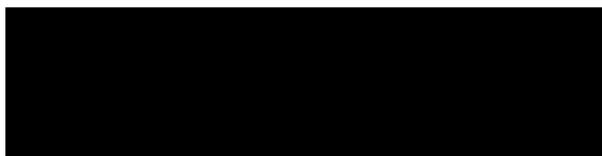
FILE: 

OCT 11 2011

IN RE: Applicant: 

APPLICATION: Application for Temporary Protected Status under Section 244 of the
Immigration and Nationality Act, 8 U.S.C. § 1254a

ON BEHALF OF APPLICANT:

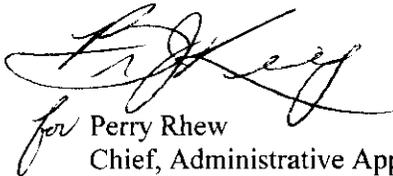


INSTRUCTIONS:

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 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 \$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 applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Honduras 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 withdrew TPS because the applicant had been convicted of two misdemeanors in the United States.

On appeal, counsel puts forth a brief disputing the director's findings.

The director may withdraw the status of an alien granted TPS under section 244 of the Act at any time if it is determined that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. 8 C.F.R. § 244.14(a)(1).

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).

"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 Federal Bureau of Investigation report dated March 1, 2010, reflects the following violations in the state of California as follows:

1. On July 1, 1993, the applicant was arrested by the Los Angeles Police Department for one count of assault with a deadly weapon other than firearm causing great bodily injury.
2. On January 30, 2001, the applicant was arrested by the Montclair Police Department for one count of petty theft.
3. On April 8, 2007, the applicant was arrested by the Sheriff's Office of San Bernardino for one count of petty theft w/prior jail.

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

- For number one, a certified letter dated November 15, 2007, from the Los Angeles Police Department, which indicates that on July 2, 1993, the applicant was released due to insufficient grounds for the complaint and that no charge was filed.

- For number two, court documentation in Case no. [REDACTED] from the San Bernardino County Superior Court, which indicates that on April 2, 2001, the applicant pled guilty to violating section 490.5 PC, petty theft of merchandise, a misdemeanor. The applicant was ordered to pay a fine, serve one day in jail, which was credited for time served and was placed on probation for two years. On August 24, 1994, the conviction was expunged in accordance with section 1203.4 PC.
- For number three, court documentation in Case no. [REDACTED] from the San Bernardino County Superior Court, which indicates that the applicant was charged with section 666 PC, petty theft with prior(s). On May 7, 2007, the applicant pled *nolo contendere* to violating section 415 PC, fighting, causing loud noise, or using offensive words in public place, a misdemeanor. The applicant was ordered to pay a fine, serve 35 days in jail, which was credited for time served and was placed on probation for three years.

On appeal, counsel citing *Matter of Deanda-Roma*, 23 I&N Dec. 597 (BIA 2003) asserts that the Board of Immigration Appeals “held that an alien who was convicted of two misdemeanor crimes involving moral turpitude was not precluded from establishing the requisite seven years of continuous residence for cancellation of removal.” Counsel asserts that the director failed to discuss the “Petty Offense Exception” which would eliminate one the applicant’s convictions for immigration purposes.

The precedent decision cited above has no merit in this proceeding as the applicant is not a lawful permanent resident, does not have two crimes involving moral turpitude and has not applied for cancellation of removal under section 240A(a) of the Act. Further, TPS proceedings are separate and distinct from removal proceedings.¹

Contrary to counsel’s assertion, the petty theft exception does not eliminate a conviction for immigration purposes; it only precludes the applicant from being found inadmissible under section 212(a)(2)(A)(i)(I) of the Act.²

The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty or *nolo contendere* and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings.

¹ TPS is by definition a temporary status for certain qualifying aliens from designated countries; it does not lead to permanent residence. Section 244(h) of the Act, 8 U.S.C. §1254a. Removal proceedings are between the United States government and an alien with a questionable right to remain in the U.S.

² The maximum penalty for a misdemeanor in California is six months. See section 19 of the California Penal Code. The applicant was not sentenced to a term of imprisonment in excess of six months.

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the INA, no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).³ State rehabilitative actions that do not vacate a conviction on the merits as a result of underlying procedural or constitutional defects are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan, id.*

There is no evidence in the record to suggest that the petty theft conviction was overturned on account of an underlying procedural or constitutional defect in the merits of the case. Therefore, despite the expungement of the conviction, the offense remains a valid conviction for immigration purposes.

The AAO has reviewed the brief on appeal and the authorities cited therein, and concludes that the two misdemeanor convictions continue to effect immigration consequences, and thus render the applicant ineligible for TPS. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to withdraw TPS 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.

³ See *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (expunged theft conviction still qualified as an aggravated felony); *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002) (expunged misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); see also *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1024 (9th Cir. 2007); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).