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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

[REDACTED]

M 1

DATE: **OCT 19 2011**

Office: NEBRASKA 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. § 1254a

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 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 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 previously filed a frivolous asylum application and, therefore, he is permanently ineligible for any benefit under section 244 of the Act.

On appeal, counsel argues that the director's decision is incorrect as "Congress created TPS, not as a benefit under the Immigration and Nationality Act, but as a way to protect individuals from harm's way after a natural disaster. The INS and regulations clearly specify the acts or actions which disqualify an individual from TPS and filing a frivolous asylum application."

Counsel indicates at Part 2 on the appeal form that a brief and/or additional evidence would be submitted to the AAO within 30 days.¹ However, more than five months later, no additional correspondence has been presented by counsel or the applicant.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state as designated by the Attorney General, now the Secretary, Department of Homeland Security (Secretary), is eligible for TPS only if such alien establishes that he or she:

- (a) Is a national of a state designated under section 244(b) of the Act;
- (b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;
- (c) Has continuously resided in the United States since such date as the Secretary may designate;
- (d) Is admissible as an immigrant except as provided under section 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4.

Section 208(d) of the Act states, in pertinent part:

- (4) Notice of privilege of counsel and consequences of frivolous application.
– At the time of filing an application for asylum, the Secretary shall –

¹ Every appeal submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions being hereby incorporated into the particular section of the regulations in this chapter requiring its submission. 8 C.F.R. § 103.2(a)(1). The Form I-290B instructs the applicant to submit a brief and additional evidence to the AAO within 30 days of filing the appeal.

- (A) advise the alien of the privilege of being represented by counsel and of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum; and
 - (B) provide the alien a list of persons (updated not less often than quarterly) who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.
- (6) Frivolous application – If the Secretary determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this Act, effective as of the date of a final determination on such application.

The regulation at 8 C.F.R. § 208.20 provides:

For applications filed on or after April 1, 1997, an applicant is subject to the provisions of section 208(d)(6) of the Act only if a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. For purposes of this section, an asylum application is frivolous if any of its material elements is deliberately fabricated. Such finding shall only be made if the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. For purposes of this section, a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal.

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

The record reflects that a Form I-862, Notice to Appear, was issued and served on the applicant on May 24, 1998. The applicant's Form I-589, Application for Asylum and Withholding of Removal, was filed on May 21, 1999. The Form I-589 advised the applicant that if it is determined that he knowingly filed a frivolous application for asylum, he would be permanently ineligible for any benefits under the Act.

In addition, on May 21, 1999, the applicant was notified by personal service of the privilege of counsel and consequences of knowingly filing a frivolous asylum application pursuant to section 208(d)(4) of the Act. The notice advised the applicant that if he knowingly filed a frivolous application for asylum, he would be barred forever from receiving any benefits under the Act.

The transcript of hearing indicates that the applicant was also given verbal notification by the immigration judge (IJ) of the consequences of knowingly filing a frivolous asylum application at the time of his removal proceedings on May 21, 1999.²

On October 28, 1999, a removal hearing was held and the applicant's asylum application was denied and he was ordered removed from the United States. The oral decision of the IJ indicates that the court found the applicant to have filed a frivolous application for asylum and, therefore, he was permanently barred from receiving any benefits under the Act. The applicant appealed the IJ's decision to the Board of Immigration Appeals (BIA). On December 7, 2001, the BIA dismissed the applicant's appeal.

The director determined that the applicant was ineligible for TPS benefits and denied the application on March 23, 2011.

Contrary to counsel's assertion, the BIA did not administratively close proceedings to allow the applicant to apply for benefits under the Haitian Refugee Immigration Fairness Act. The BIA dismissed the appeal because the applicant failed to specify the reasons for the appeal on Form EOIR-26 or EOIR-29 or other document filed therewith pursuant to 8 C.F.R. § 1003.1(d)(2)(i)(A).

It is noted that the record does reflect that in another proceeding, the IJ rescinded the applicant's lawful permanent resident status on July 23, 2008.³ On March 17, 2010, the BIA remanded the proceedings. This proceeding is separate from the removal proceedings relating to the asylum application.

Because the immigration court found the applicant to have filed a frivolous application for asylum, there is a lifetime bar to any benefit. Regardless of the humanitarian and temporary nature of TPS, it is still a benefit. The AAO, is bound by the clear language of the statute and lacks the authority to change the statute. There is no waiver available, even for humanitarian reasons, due to the applicant's ineligibility pursuant to section 208(d)(6) of the Act. Consequently, the director's decision to deny the TPS application on this ground 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).

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

² The removal proceedings were subsequently continued.

³ It was determined by USCIS that the applicant's application for adjustment of status was approved in error.

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 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.

Along with the filing of his TPS application, the applicant submitted court documentation in Case no. [REDACTED] from the Lynn District Court of Massachusetts, which reflects that on September 30, [REDACTED] the applicant was charged with violating M.G.L. chapter 265, section 15A(b), assault and battery with a dangerous weapon and M.G.L. chapter 265, section 13A(b), aggravated assault and battery. On May 25, 2006, the applicant entered a “Guilty Plea or Admission to Sufficient Facts accepted after colloquy and 278 § 29D warning.” Sufficient facts were found and the case was continued without guilty finding until May 25, 2007. The applicant was ordered to enter a batterers program and pay court cost. On July 10, 2007, the charges were dismissed.

An admission to “sufficient facts” is deemed to be an admission to facts sufficient to warrant a finding of guilt. See *Luk v. Commonwealth*, 658 N.E.2d 664, 667 n.6 (Mass. 1995) (citing *Commonwealth v. Duquette*, 438 N.E.2d 334 (1982)); Mass. Gen. Laws chapter 278, section 18.

The applicant’s guilty plea or admission to sufficient facts is a conviction within the meaning of section 101(a)(48)(A) of the Act.

The record also reflects the following offenses in the state of Massachusetts.

1. The applicant was arraigned on January 29, 2002, in the Peabody District Court for operating motor vehicle after suspended license. Case no. [REDACTED]

2. On April 30, 2003, the applicant was arrested or received by the [REDACTED] Police Department for "Warrant, failure to appear."
3. The applicant was arraigned on September 11, 2003, in the Chelsea District Court for operating motor vehicle after suspension. Case no. [REDACTED]
4. The applicant was arraigned on May 18, 2004, in the Haverhill District Court for operating motor vehicle after suspended license. Case no. [REDACTED]
5. On December 30, 2005, the applicant was arrested or received by the [REDACTED] Police Department for "Default/failure to appear."
6. On December 31, 2005, the applicant was arrested or received by the Sheriff's Office in Middleton for "A&B with dangerous weapon."
7. On December 21, 2006, the applicant was arrested by the Boston Police Department and arraigned on December 22, 2006, in the Boston District Court for operating a motor vehicle after suspended license - subsequent offense. Case no. [REDACTED]

On June 17, 2010, a notice was issued requesting that the applicant submit certified judgment and conviction documents for all arrests. In response, the applicant through counsel indicated that the arrests in numbers two, five and six "were all related to the offense from 2003 from the [REDACTED] District Court and were caused by default warrants that were listed on that previously provided Docket Sheet." Counsel indicated that the applicant had one driving related offense in 2006, but he was unable to obtain the docket sheet from the Boston Municipal Court. Counsel provided a payment receipt dated April 10, 2007, in Case no. [REDACTED]

The applicant's assertion has no merit as the arrest in number two occurred five months prior to the arrest of September 30, 2003, and he has not provided credible evidence from either the court or the arresting agency to support his assertion. Likewise, the applicant has the burden to establish with affirmative evidence that the arrests in numbers five and six relate to the offenses in Case no. [REDACTED]. 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)).

As noted above, the applicant was requested to submit the dispositions for all arrests. The applicant has failed to provide the final court dispositions for numbers one through seven.

The applicant is ineligible for TPS because of his failure to provide the requested court documentation necessary for the adjudication of his application. 8 C.F.R. § 244.9(a). The applicant is also ineligible for TPS due to his criminal convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the TPS application must be denied on these bases as well.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. 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.