



U.S. Citizenship
and Immigration
Services

[REDACTED]

M1

DATE: Office: VERMONT SERVICE CENTER FILE [REDACTED]

DEC 03 2012

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 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Ron M. Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and to reconsider its prior decision. The motion will be dismissed.

The applicant is a native and a citizen of El Salvador who was granted Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director withdrew the applicant's TPS because the applicant failed to submit requested court documentation relating to his criminal record.

The AAO, in dismissing the appeal on April 5, 2012, concurred with the director's decision. The AAO conducted appellate review on a *de novo* basis and determined that the applicant is not eligible for TPS because he had failed to submit requested court documentation, including but not limited to, documents from the court explaining the reason the applicant was tried as a juvenile for a sex crime he committed in 1996 and all court dispositions pertaining to his entire criminal record in the United States.¹

A motion to reopen must state the new facts to be proved at the reopened proceeding, and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

A motion to reconsider must state the reason for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy ... [and] must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

On motion, counsel reasserts his claim that the applicant is not disqualified from TPS because the applicant has not been convicted of a felony. Counsel contends that the applicant's conviction in 1996 was as a juvenile and that juvenile convictions are not considered convictions for federal immigration purposes. In support of this motion, counsel submitted a brief indicating that the applicant was born on [REDACTED] 1971, that the certified juvenile delinquency record of the applicant controls the outcome of this proceeding and that the applicant was not "convicted" of a felony. Counsel states "although [the applicant] was an adult when he suffered the felony arrest, in the end, the Los Angeles Superior Court adjudicated the matter as if [the applicant] were a juvenile." Counsel also submitted an excerpt of the applicant's birth certificate indicating the applicant's date of birth as [REDACTED] 1979, and a copy of the applicant's Salvadoran passport indicating that the applicant was born on [REDACTED] 1973.

¹ The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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).

“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.

In this case, the record includes a Federal Bureau of Investigation (FBI) report dated March 10, 2010, indicating that on September 24, 1996, the applicant was arrested by the Los Angeles, California, Police and charged with one count of “F oral cop per under 14/10 years diff.” The FBI report listed the applicant’s date of birth at the time of arrest as [REDACTED] 1973. In a Municipal Court document related to the trial and the conviction of the applicant on this offense, the applicant’s date of birth was listed as [REDACTED] 1979. The court tried the applicant and convicted him as a juvenile.

The record contains a copy of the applicant’s passport listing his date of birth as [REDACTED] 1973. The AAO notes that at issue in this case is the applicant’s correct date of birth which would have determined whether the applicant would have been tried as an adult as opposed to his trial as a juvenile for the 1996 sexual crime. The applicant was advised of the discrepancies regarding the dates of birth and was requested to submit a certified statement from the Los Angeles, California Municipal Court explaining the discrepancy in the date of birth listed on the court document. The applicant has failed to submit the requested document.

The AAO notes that the discrepancy in the applicant’s date of birth is material to the outcome of the 1996 sexual crime by the applicant. Counsel admitted that the applicant was an adult when he committed the felony child sexual abuse, but contends that the court’s disposition of the case as a juvenile offense should control the outcome of this proceeding. Counsel has consistently failed to submit certified court explanation as to why the applicant may have been tried as a juvenile when in fact he was an adult at the time he committed the offense. The inconsistency in the applicant’s date of birth is material to the applicant’s eligibility for TPS in that it may have a direct bearing on whether the applicant is or is not guilty of a felony which may render him ineligible for TPS in the United States. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence pointing to where the truth lies. Doubt cast on any aspect of the applicant’s proof may lead to a reevaluation of the reliability and sufficiency of the

remaining evidence offered in support of the application. *Matter of Ho*, 19 I & N Dec. 582, 591-592 (BIA).

The basis for the denial of the application and the subsequent appeal was the applicant's failure to submit the requested documentation from the court to clarify or reconcile the discrepancy in the applicant's date of birth. On motion, the applicant failed to submit any credible and objective evidence to address or reconcile the discrepancy. As such, the issue on which the underlying decisions were based has not been addressed or overcome on motion.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. That burden has not been met since the applicant has not provided any new facts or additional evidence to overcome the previous decision of the AAO. Nor is the applicant's stated reason for reconsideration supported by any pertinent precedent decisions to establish that the decisions were based on an incorrect application of law or Service policy when filed, or that the decision was incorrect based on the evidence of record at the time of the initial decision. Accordingly, the motion to reopen and reconsider will be dismissed and the previous decision of the AAO will not be disturbed.

ORDER: The motion is dismissed. The previous decision of the AAO dated November 22, 2011 is affirmed.