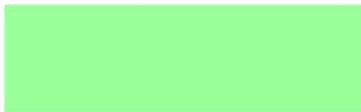




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 26 2013**

Office: VERMONT 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:

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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 The previous decision of the AAO will be withdrawn and the appeal will be dismissed.

The applicant is a native and 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 TPS because the applicant had been convicted of at least two misdemeanors in the United States. On April 5, 2012, the AAO summarily dismissed the appeal as the applicant had failed to provide any evidence to overcome the director's finding and failed to identify specifically any erroneous conclusion of law or statement of fact for the appeal

On motion, counsel provides a confirmation printout from FedEx.com to support his claim that a brief had been timely submitted to the Vermont Service Center in May 2011. Counsel submits a copy of his brief.

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 U.S. Citizenship and Immigration Service (USCIS) 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).

In this case, the applicant failed to support his motion with any legal argument or precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. The motion to reconsider will be dismissed.

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). Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹ A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

On motion, counsel asserts that the applicant's first conviction of driving while ability impaired is a Class A traffic infraction.

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).

¹ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

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 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.

The record contains court documentation in Case no. [REDACTED] from the County Court of Adams County, Colorado, which indicates that the applicant was charged with driving while ability impaired (DWAI), a violation of C.R.S. 42-4-1301(1)(b), driving under the influence, a violation of C.R.S. 42-4-1301(2)(a), marijuana possession under one ounce, a violation of CRS 18-18-406(1) and alcohol-underage possession/consumption, a violation of C.R.S.18-13-122. The applicant entered a plea of guilty for violating C.R.S. 42-4-1301(1)(b), and on August 18, 2009, the applicant was convicted of this misdemeanor offense. The applicant was ordered to pay a fine and court cost and was placed on probation for twelve months. The remaining charges were dismissed.

The record also contains court documentation in Case no. [REDACTED] from the County Court of Arapahoe County, Colorado, which indicates that on July 4, 2008, the applicant was arrested for violating C.R.S. 42-4-1402, careless driving, and C.R.S. 42-4-1301, driving under the influence with prior DWAI. On May 6, 2010, the applicant was found guilty of both misdemeanor offenses. The applicant was sentenced to serve 365 days in jail, ordered to pay fines and court costs and was placed on supervised probation for 18 months.

On motion, counsel, citing C.R.S. 42-4-1301(a.5)(I), asserts that the applicant's first offense was a Class A infraction.² Counsel, however, has not provided any evidence to support his assertion. The assertion of counsel does not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA

² It is a class A traffic infraction for any person under twenty-one years of age to drive a motor vehicle or vehicle when the person's BAC, as shown by analysis of the person's breath, is at least 0.02 but not more than 0.05 at the time of driving or within two hours after driving.

1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

C.R.S. 42-4-1301(1)(b) provides that it is a misdemeanor for any person who is impaired by alcohol or by one or more drugs, or by a combination of alcohol and one or more drugs, to drive a motor vehicle or vehicle. The court document clearly reflects that the applicant pled guilty to a misdemeanor offense of C.R.S. 42-4-1301(1)(b). If counsel is challenging the clarity of the court order that issue is not within the purview of the AAO, rather the issue lies with the jurisdiction of the judicial court.

The applicant is ineligible for TPS due to his three misdemeanor convictions. 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.

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.

ORDER: The appeal is dismissed.