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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: AUG 0 9 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: Self-represented

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont 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 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 denied the application because he found the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to her drug-related convictions.

On appeal, the applicant asserts, "I have committed the violations, but the time at which they were committed, the new immigration act of 1997 had not been enacted." The applicant states that the crimes committed were not aggravated felonies or misdemeanors, but she is in the process of having one of the charges reduced to an infraction. The applicant requests that her application be reconsidered as she has a family to support.

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 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.

Section 101(a)(48)(B) of the Act provides, "any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."

An alien is inadmissible if she has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC § 802). Section 212(a)(2)(A)(i)(II) of the Act.

The current Federal Bureau of Investigation report reflects the applicant's criminal history in the state of California as follows:

1. On April 10, 1995, the applicant was arrested by the Police Department for petty theft.
2. On May 23, 1996, the applicant was arrested by the Police Department for transportation/sell narcotic controlled substance and possession of base rock/cocaine for sale.

The record contains:

- Court documentation in Case no. from the Municipal Court of Courthouse Judicial District, County, which indicates that on April 17, 1995, the applicant was charged with violating section 484(a) PC, petty theft, a misdemeanor. On June 27, 1995, the applicant pled guilty to the offense and was ordered to pay a fine and court cost.

- Court documentation in Case no. from the Superior Court of Judicial District, County, which indicated that on May 28, 1996, the applicant was charged with violating section 11352(a) H&S, transportation/sale of a controlled substance, and section 11351.5 H&S, possession of cocaine base for sale, both felonies. On June 4, 1996, the applicant pled *nolo contendere* to each offense. On June 18, 1996, the applicant was placed on formal probation for three years on condition she served 180 days in the county jail (39 days credited for time served).

The applicant's statements on appeal have been considered. An appeal, however, must be decided according to the law as it exists on the date it is before the appellate body. *See Matter of Patel*, 19 I&N Dec. 774, 779 (BIA 1998) (citing *Bradley v. Richmond School Board*, 416 U.S. 696, 710-1 (1974)). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. *See also Landgraf v. US Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483 (1994); *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). A time limitation is not provided for criminal activities for applicants for TPS under section 244(c)(2)(b) of the Act, and as provided in 8 C.F.R. § 244.4(a).

The records clearly indicate that the applicant was convicted in the Superior Court of felony offenses of sections 11352(a) H&S and 11351.5 H&S, both offenses punishable by imprisonment pursuant to subdivision (h) of section 1170 PC for a period of three, four, or

five years. The fact that the applicant was not sentenced to state prison is not evidence that the applicant's convictions were misdemeanors. Further, the court disposition makes no mention that the offenses were handled as misdemeanors. As cited above, a felony is any offense that is punishable by imprisonment for a term of more than one year, *regardless of the term such alien actually served, if any*. (Emphasis added.) Therefore, each offense constitutes a felony for immigration purposes in Case no. NA028756.

The applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to her drug-related convictions. There is no waiver available for inadmissibility under this section of the Act. Consequently, the director's decision to deny the application for this reason 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).

While the issue of the applicant's ineligibility was not raised by the director, the applicant is also ineligible for TPS due to her felony convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Therefore, the application must also be denied on this basis.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.