



U.S. Citizenship  
and Immigration  
Services

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DATE: **MAR 29 2013**

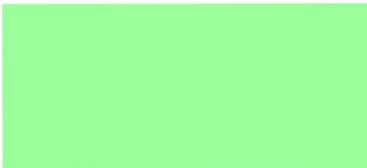
Office: NEBRASKA SERVICE CENTER

FILE:

IN RE: Applicant:

APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 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 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 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 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, is permanently ineligible for any benefit under section 244 of the Act. The director also denied the application because the applicant had been convicted of a felony in the United States, and that the applicant was found inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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.

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act. 8 U.S.C. § 1182(a)(2)(A)(i).

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 –
  - (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 served on the applicant on June 24, 1999. The applicant's Form I-589, Application for Asylum and Withholding of Removal, was filed on October 7, 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. During his removal hearing on October 7, 1999,<sup>1</sup> the applicant was advised by the immigration judge of the consequences of knowingly filing a frivolous asylum application. The immigration judge advised the applicant that if he knowingly filed a frivolous application for asylum, he would be forever barred from receiving any benefits under the Act.

On January 19, 2000, 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 immigration judge (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 April 8, 2002, the BIA summarily dismissed the appeal.<sup>2</sup>

Based on the above finding, the director determined that the applicant was ineligible for TPS benefits and denied the application on April 26, 2012.

On appeal, counsel puts forth several arguments challenging the IJ's decision. Counsel cannot collaterally attack the IJ's decision before the AAO. The BIA is the appropriate forum for disputing the IJ's decision. The applicant has the opportunity on appeal and on motion to the BIA to dispute those findings.

Because the court found the applicant to have filed a frivolous application for asylum, there is a lifetime bar to any benefit. Regardless of the 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.

The second issue to be addressed is the applicant's criminal history.

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<sup>1</sup> The removal proceedings were subsequently continued.

<sup>2</sup> The applicant did not file a brief or statement, or reasonably explain his failure to do so within the time set for filing. The BIA indicated that, upon review of the record, it was not persuaded that the IJ's ultimate resolution of this case was in error.

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

1. On March 25, 1997, the applicant was arrested under the alias of [REDACTED] by the Sheriff's Office of Collier County, Florida for dealing in stolen property and petty theft.
2. On April 12, 2011, the applicant was arrested by the Sheriff's Office in New Orleans, Louisiana for simple assault.

Along with his TPS application, the applicant submitted the following:

- Court documentation in Case no. [REDACTED] from the Collier County Circuit Court of Florida, which indicates that on May 1, 1997, the applicant was charged with dealing in stolen property, a violation of Florida Statute 812.019(1), a felony of the second degree, and petty theft, a violation of Florida Statute 812.014(3)(a), a misdemeanor of the second degree. On June 24, 1997, the applicant was convicted of both charges. For violating Florida Statute 812.019(1), the applicant was ordered to perform 40 hours of community services and pay court cost and was placed on probation for 24 months. For violating Florida Statute 812.014(3)(a), the applicant was sentenced to serve 60 days in jail.
- Court documentation in Case [REDACTED] from the Orleans Parish Magistrate Court of Louisiana, which indicates that on May 12, 2011, the magistrate refused to prosecute.

Florida Statute 812.019(1) provides that any person who traffics in, or endeavors to traffic in, property that he or she knows or should know was stolen shall be guilty of a felony of the second degree.

The AAO notes that courts have found that possessing, transporting, and receiving stolen goods with the knowledge that the goods are stolen is a crime involving moral turpitude. *Michel v. INS*, 206 F.3d 253 (2nd Cir. 2000) (New York Statute involved knowing possession of stolen property, with the intention to benefit himself or a person other than the owner or to impede the recovery by the owner); *Wadman v. INS*, 329 F.2d 812 (9th Cir. 1964); *Matter of A-*, 7 I. & N. Dec. 626 (BIA 1957) (knowledge, as an essential element of the crime, is implied (Article 648, Italian Penal code)); *Matter of De La Nues*, 18 I. & N. Dec. 140 (BIA 1981), § 22-2205 District of Columbia Code; *Accord De Leon-Reynoso v. Ashcroft*, 293 F.3d 633 (3rd Cir. 2002) (receiving stolen property in violation of Pennsylvania statute required subjective belief property was stolen, and therefore, is a crime involving moral turpitude); *U.S. v. Castro*, 26 F.3d 557 (5th Cir. 1994) (receiving stolen autos). *Matter of Fernandez*, 14 I. & N. Dec. 24 (BIA 1972) (transporting forgery securities in interstate commerce in violation of 18 U.S.C. § 2314 held to be a crime involving moral turpitude). See also, *Matter of Acosta*, 14 I. & N. Dec. 338 (BIA 1973) (transporting forgery securities in foreign commerce). Finally, trafficking in counterfeit goods and services had been held to be a crime involving moral turpitude. *Matter of Kochlani*, 24

I. & N. Dec. 128 (BIA 2007). Thus, the AAO finds the applicant's conviction under Florida Statutes § 812.019(1) to be a crime involving moral turpitude.

On appeal, counsel asserts that Florida Statute 812.025 (1997)<sup>3</sup> prohibits the trier of fact from finding the accused guilty under both counts. Counsel, citing *Hall v. State*, 826 So. 2d 268 (Fla. 2002), states that the applicant's sentence is illegal and is statutorily prohibited under 1997, 2002 and current Florida law. Counsel states even though the applicant's sentence is illegal and thus void *ab initio*, on May 1, 2012, a Motion to Correct an Illegal Sentence was filed before the 20<sup>th</sup> Judicial Circuit Court. Counsel states that upon receipt of a new sentence, it will be forwarded to U.S. Citizenship and Immigration Services.

Although Florida Statute and case law state that a guilty verdict cannot be returned on both offenses (theft and dealing with stolen property), counsel cannot collaterally attack the decision of the court before the AAO. The AAO may only look to the judicial records to determine whether the person had been convicted of the crime, and may not make a determination to the validity of state convictions.

Without certified documentation from the court indicating that the felony conviction has been vacated for underlying procedural defects having to do with the merits of the case, the conviction continues to effect immigration consequences. The applicant is ineligible for TPS due to the felony conviction detailed above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). The applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act due to his conviction of dealing in stolen property. Consequently, the director's decision to deny the application on this ground will be affirmed.

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.

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<sup>3</sup> Notwithstanding any other provision of law, a single indictment or information may, under proper circumstances, charge theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts that may be consolidated for trial, but the trier of fact may return a guilty verdict on one or the other, but not both, of the counts.