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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

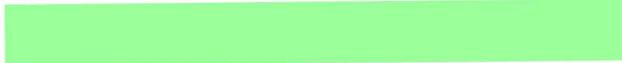


DATE: **MAY 21 2013**

Office: VERMONT SERVICE CENTER



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 Vermont Service Center. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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 sustained.

The applicant claims to be a citizen of Honduras who is applying for 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 failed to establish that she was eligible for late registration. The director also denied the application because the applicant had been convicted of two misdemeanors in the United States.

On appeal, counsel argues that the minute order from the California Superior Court clearly indicates that the applicant entered a plea of no contest to a lesser included/reasonably related offense of 490.1. Counsel states, in pertinent part:

The I on the minute order is reasonably construed to indicate that the original count of violation of California Penal Code section 484 was reduced to an infraction. The fact that the judge sentenced [the applicant] to a fine of \$300 instead of \$250 as contemplated by the statute is not indicative that the offense was adjudicated as a misdemeanor because such assertion contradicts the order of the California Superior Court judge. USCIS may not assume facts that are not in evidence in order to justify its denial of the application for relief.

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 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; and
- (f)
 - (1) Registers for TPS during the initial registration period announced by public notice in the FEDERAL REGISTER, or
 - (2) During any subsequent extension of such designation if at the time of the initial registration period:

- (i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;
 - (ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;
 - (iii) The applicant is a parolee or has a pending request for reparole; or
 - (iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.
- (g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of conditions described in paragraph (f)(2) of this section.

Persons applying for TPS offered to Hondurans must demonstrate that they have continuously resided in the United States since December 30, 1998, and that they have been continuously physically present since January 5, 1999. The initial registration period for Hondurans was from January 5, 1999, through August 20, 1999. Subsequent extensions of the TPS designation have been granted, with the latest extension granted until July 5, 2013, upon the applicant's re-registration during the requisite period.

The burden of proof is upon the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by U.S. Citizenship and Immigration Services (USCIS). 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet his or her burden of proof, the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. 8 C.F.R. § 244.9(b).

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

The first issue in this proceeding is whether the applicant's criminal record in the state of California renders her ineligible for TPS.

The record reveals that the applicant filed her initial TPS application [REDACTED] on March 8, 1999. On July 25, 2000, the application was granted. On November 18, 2010, the director withdrew TPS because the applicant had been convicted of two misdemeanors in the United States. No appeal was filed from the decision withdrawing TPS.

The record contains the court documents which reflect the following:

1. On April 5, 1996, the applicant was charged with violating § 20002(a) VC, hit and run causing property damage, and §12500(a) VC, unlicensed driver. On April 17, 1996, the applicant was convicted of violating § 20002(a) VC, a misdemeanor. Imposition of sentence was suspended and the applicant was placed on summary probation for two years and was ordered to pay a fine and court cost. The remaining charge was dismissed. Case no. [REDACTED]
2. On December 29, 2009, the applicant was charged with violating § 484(a) PC, petty theft. On May 20, 2010, the applicant pled no contest to a lesser included/reasonably related offense of "I 490.1 PC." The applicant was ordered to pay a fine of \$300 and complete parenting classes. Case no. [REDACTED]

The director determined that there was no evidence in the record to corroborate counsel's claim that the offense in number two above had been reduced to an infraction. The director noted that if the offense had been reduced to an infraction, the fine received would have been statutorily capped at \$250. The director concluded that the applicant had been convicted of two misdemeanors in the United States and denied the application on August 17, 2012.

California Penal Code § 490.1 provides:

- (a) Petty theft, where the value of the money, labor, real or personal property taken is of a value which does not exceed fifty dollars (\$50), may be charged as a misdemeanor or an infraction, at the discretion of the prosecutor,

provided that the person charged with the offense has no other theft or theft-related conviction.

(b) Any offense charged as an infraction under this section shall be subject to the provisions of subdivision (d) of Section 17 and Sections 19.6 and 19.7.

A violation which is an infraction under this section is punishable by a fine not exceeding two hundred fifty dollars (\$250).

The applicant has the burden to establish, with affirmative evidence, that the charge resulted in an infraction conviction. The plain language in the statute as written indicates an infraction is punishable by a fine not exceeding \$250. The court documentation submitted indicates that the applicant was fined \$300. Nevertheless, because the penalty for violating § 490.1 PC is only a fine and not punishable by imprisonment, the applicant was not convicted, for immigration purposes, of the misdemeanor offense. 8 C.F.R. § 244.1.

For immigration purposes, the applicant has one misdemeanor conviction (§ 20002(a) VC), and it does not render the applicant ineligible for TPS under the provisions of section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a). Therefore, the director's decision to deny the current application on this ground will be withdrawn. In addition, the director's decision to withdraw the applicant's TPS will, itself, be withdrawn and her TPS reinstated.

The second issue in this proceeding is whether the applicant is eligible for late registration.

To qualify for late registration, the applicant must provide evidence that during the initial registration period she fell within at least one of the provisions described in 8 C.F.R. § 244.2(f)(2) above. If the qualifying condition or application has expired or been terminated, the individual must file within a 60-day period immediately following the expiration or termination of the qualifying condition in order to be considered for the late initial registration. 8 C.F.R. § 244.2(g).

The record reveals that the applicant filed her initial TPS application [REDACTED] on March 8, 1999. On July 25, 2000, the application was granted. On November 18, 2010, the director withdrew TPS because the applicant had been convicted of two misdemeanors in the United States. No appeal was filed from that decision withdrawing TPS. The applicant filed the current TPS application on January 24, 2012 and indicated that it was her first application to register for TPS.

The fact that the sole basis for the withdrawal of the applicant's TPS has, itself, been withdrawn, the issue of whether the applicant has established late registration eligibility is moot.

Finally, it is noted that the record contains an Order of the Immigration Judge, indicating that during removal proceedings on October 24, 2012, the applicant was granted TPS.

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 met this burden.

ORDER: The appeal is sustained.