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

(b)(6)

DATE: APR 0 9 2014 Office: NEBRASKA 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 (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,

for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn and an application for re-registration was simultaneously denied by the Director, Nebraska Service Center. The applicant has appealed the denial of the re-registration application and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

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

On July 16, 2013, the director denied the re-registration application because the applicant had been convicted of a felony. Citing *Matter of Scherbank*, 10 I&N Dec, 522 (BIA 1964), the director determined that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act due to his conviction.

On appeal, counsel asserted that the applicant "is appealing the determination that he has a felony conviction for a crime of moral turpitude that renders him ineligible for TPS." Counsel stated that the applicant received ineffective assistance of counsel and is seeking post-conviction relief. Counsel indicated at Part 2 on the appeal form that a brief and/or additional evidence would be submitted to the AAO within 30 days.[1] Counsel, in his brief, requested an additional 90 days to supplement the appeal. To date, no additional correspondence has been presented by counsel or the applicant. Therefore, the record must be considered complete.

It is noted that the record reflects that on November 15, 2013, the applicant put forth a Freedom of Information Act request, which was processed on January 2, 2014.

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.

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.

---

[1] Every appeal submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions being hereby incorporated into the particular section of the regulations in this chapter requiring its submission. 8 C.F.R. § 103.2(a)(1). The Form I-290B instructs the applicant to submit a brief and additional evidence to the AAO within 30 days of filing the appeal.

The AAO conducts appellate review on a *de novo* basis. *See Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The first issue to be addressed is counsel's claim on appeal of ineffective assistance of counsel.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The applicant has failed to submit an affidavit in support of his claim, evidence confirming that counsel has been notified of the incompetency claim, or evidence demonstrating that a complaint, based upon the allegations, has been filed with the appropriate disciplinary authorities. To the extent that the applicant has failed to produce evidence sufficient to substantiate an ineffective assistance of counsel claim, the AAO will review the record applying standard statutory and regulatory eligibility requirements and burdens of proof.

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

The record contains court documentation from the Superior Court of Atlantic County, New Jersey, which indicates that on April 22, 2011, the applicant pled guilty to swindling and cheating, a violation of NJSA 5:12-113, a crime of the third degree. The applicant was placed on probation for three years and ordered to pay court cost and restitution.

New Jersey law provides that a person convicted of a crime of the third degree is punishable by imprisonment of not less than three years but no more than five. *See* NJS 2C:43-6. As cited above, for immigration purposes, a felony is a crime "*punishable* by imprisonment for . . . more than one year, *regardless of the term . . . actually served*." [Emphasis added.] The operative word is "punishable," which indicates that a misdemeanor is defined under the regulation by the maximum imprisonment possible for the crime under New Jersey law, not the specific prison term meted out by the judge in a particular case.

Counsel, on appeal, asserts that the applicant is seeking post-conviction relief.

Without certified documentation from the court indicating that the above conviction has been vacated for underlying procedural or constitutional defect having to do with the merits of the case, the felony conviction will continue to affect immigration consequences. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

The applicant is ineligible for TPS due to his felony conviction. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). There is no waiver available, even for humanitarian reasons, of the requirements stated above.

The Supreme Court has held that crimes that involve fraud categorically fall into the definition of crimes involving moral turpitude. *See Jordan v. De George,* 341 U.S. 223, at 227, (U.S. 1951) (noting that, without exception, a crime in which fraud is an ingredient involves moral turpitude.); *see also Cerezo v. Mukasey,* 512 F.3d 1163, at 1167 (9th Cir. 2008); *Carty v. Ashcroft,* 395 F.3d 1081, 1083 (9th Cir.2005). The director noted that although running an illegal gambling scheme has been found not to involve moral turpitude, the separate offense of cheating at a legal gambling game does involve fraud and moral turpitude. The director determined that the applicant's conviction constituted a CIMT.

Consequently, the director's decision to deny the application on these grounds will be affirmed.

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.

While not the basis for the dismissal of the appeal, it is noted the record contains a Federal Bureau of Investigation report, which indicates that on April 3, 1985, the applicant was arrested under the name [redacted] by the New York Police Department for grand larceny in the third degree and criminal impersonation. The court disposition, however, is not in the record. This arrest must be addressed in any future proceedings.

ORDER: The appeal is dismissed.