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**APR 30 2015**

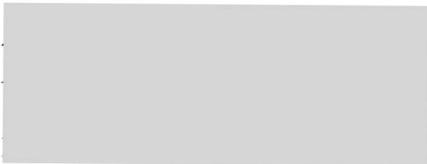
Date: Office: CALIFORNIA SERVICE CENTER

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 (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.

Thank you,

f/

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**DISCUSSION:** The applicant's Temporary Protected Status was withdrawn and an application for re-registration was simultaneously denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

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. § 1254a, from May 10, 2010 to July 22, 2011, and again from July 23, 2011 to January 22, 2013. On June 17, 2013, in response to the applicant's November 23, 2012 second re-registration application, USCIS sent the applicant a Request for Evidence seeking documentation of her criminal record, and indicated that failure to do so would result in denial of the application. On August 7, 2013, the director denied re-registration and withdrew TPS for failure of the applicant to submit documentation of the final court disposition requested, as well as based on discretion. The Director's Denial decision was not issued until August 21, 2014. *See Decision of the Service Center Director, August 21, 2014.*<sup>1</sup>

On appeal, the applicant asserts through counsel that USCIS erroneously found the applicant not to merit TPS. In addition, the applicant claims that, as a matter of law, USCIS erred in finding the applicant committed a crime involving moral turpitude and points out that she was neither convicted of nor admitted committing such a crime. The applicant contends that as the record fails to establish she committed a crime involving moral turpitude, there was no basis on which to deny re-registration or withdraw TPS.

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 foreign 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.

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<sup>1</sup> By this time, on March 18, 2014, the applicant had filed a new Form I-821. The Director denied this re-registration request on July 25, 2014, and the denial decision, also issued August 21, 2014, cites prior TPS withdrawal as the reason the applicant is ineligible for re-registration. We note that, as the applicant filed only one appeal, we limit our decision to the merits denial of the Form I-821 filed on November 23, 2012.

Pursuant to section 244(c)(3) of the Act, the Secretary shall 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. An alien shall not be eligible for TPS under this section if the Secretary finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States. Section 244(c)(2)(B)(i). Further, an alien is inadmissible and therefore ineligible for TPS 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.

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 reflects that in May 2006, after a house fire that resulted in the death of one of her children, the applicant was arrested and initially charged with one count of Aggravated Manslaughter of a Child, Fla. Stat. § 782.07(3), and two counts of Child Neglect with Great Harm, Fla. Stat. § 827.03(a) and (b). On June 12, 2006, she was charged in Florida Circuit Court with two counts of child neglect. The applicant pleaded not guilty and was placed in a Pretrial Diversion Program on June 29, 2007. After she completed the pretrial diversion program, a disposition of nolle prosequi was entered. Although the applicant was not convicted as a result of her 2006 arrest, the director determined the applicant's statement to the police that she had left her children alone constituted an admission of facts sufficient for a conclusion she had committed a crime involving moral turpitude.

On appeal, the applicant asserts that USCIS erroneously found the applicant inadmissible, and also erred in finding her not to merit TPS as a matter of discretion, despite there being no factual changes in the applicant's criminal background since the original grant of TPS and a subsequent renewal of TPS. In addition, the applicant points out that her legal history was known to USCIS at the time it granted TPS and that, as a matter of law, USCIS erred in finding the applicant committed a crime involving moral turpitude. It is uncontested that the applicant never pled guilty or acknowledged guilt as a condition to participation in Pretrial Diversion. Further, the applicant points out that the prosecutor dismissed all charges against her without trial.

Although recognizing that the applicant was never convicted, the director concluded she had admitted having committed a crime involving moral turpitude and thus found her inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant asserts that she has not been convicted of any crimes nor does she meet any other grounds for TPS ineligibility. The applicant disputes having made any admission of guilt. The record shows that, while in police custody, the applicant made a post-Miranda statement in which she admitted leaving her children home alone. However, the record fails to show that those taking her statement provided any explanation of the nature and definition of the crime with which she was charged – child neglect – or the elements of the crime.

The Board of Immigration Appeals (BIA) has held that for an incriminating statement to be an admission, besides being voluntary and admitting the essential elements of the crime, it must be preceded by a definition of the crime and explanation of its essential elements. *Matter of K*, 7 I&N Dec. 594, 597 (BIA 1957) (“valid admission of a crime for immigration purposes requires that the alien be given an adequate definition of the crime, including all essential elements, and that it be explained in understandable terms.”). There is no indication on the record that the applicant was given an adequate definition of the crime of child neglect, including all essential elements, before providing her statement to the police, and we thus conclude the applicant is not inadmissible for having admitted to committing a crime involving moral turpitude. She is therefore eligible for TPS under section 244(c) of the Act.

The director also determined that the applicant is not entitled to TPS as a matter of discretion, stating that despite her residence in the United States since 1999 and family ties, the negative factors in her case outweigh the positive factors.<sup>2</sup>

We are unaware of any precedent decision addressing the exercise of discretion in an application for TPS, but decisions of the BIA and federal courts concerning other immigration benefits have generally held that in making such a decision, the relevant factors must be balanced and both positive and adverse factors considered. *See, e.g., Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970) (in an application for adjustment of status, “[g]enerally favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting favorable exercise of administrative discretion.”). Where adverse factors are present in a given application, it may be necessary for the applicant to offset these by a showing of unusual or even outstanding equities. *Id.* In *Zuh v. Mukasey*, 547 F.3d 504, 507 (4th Cir. 2008), the Fourth Circuit Court of Appeals held that the immigration judge erred in failing to consider totality of circumstances in denying asylum as a matter of discretion. The court provided a non-exhaustive list of factors to be considered, including family, business, community, and employment ties to the United States; length of residence and property ownership in this country; evidence of hardship to the alien and his family if deported to any country; evidence of good character, value, or service to the community; general humanitarian reasons, such as age or health; nature and underlying circumstances of any exclusion ground; presence of significant violations of immigration laws; presence of a criminal record and the nature, recency, and seriousness of that record; lack of candor with immigration officials; and other evidence that indicates bad character or undesirability for permanent residence in the United States. *Id.* at 510-11.

In adjudicating applications for waivers of inadmissibility, the BIA has required a balancing of the adverse factors evidencing the applicant's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf. *See Matter of Mendez*, 21 I&N Dec. 296, 300 (BIA 1996); *see also Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991); *Matter of Edwards*, 20 I&N

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<sup>2</sup> Section 244(c)(3) of the Act provides that the status of an alien granted TPS may be withdrawn 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. It is not clear whether the director may withdraw TPS as a matter of discretion after it has been granted when the alien is not found to be ineligible under this section.

Dec. 191 (BIA 1990). The BIA has further found that an arrest report, absent a conviction or corroborating evidence of the allegations contained therein, should not be given substantial weight. *Matter of Arreguin*, 21 I&N Dec. 38, 42 (BIA 1995); *see also Avila-Ramirez v. Holder*, 764 F.3d 717 (7<sup>th</sup> Cir. 2014).

In the present case, we note that the applicant disclosed her arrest in her initial TPS application and a first re-registration and that she provided documents responsive to the RFE. Thus, these facts have been known to USCIS since it first granted her TPS in 2010. The applicant's positive equities include her residence in the country since 1999; record of long-term employment; ties to the community, including home ownership; the presence of two children in the United States; potential hardship to the applicant and her children if she had to return to Haiti, particularly in light of the conditions there that led to the TPS designation and re-designation; and lack of any arrest since 2006 and her successful completion of a pretrial diversion program. The negative factor is her 2006 arrest resulting from a fire that killed one of her children.

As noted above, the applicant was initially charged with two counts of Child Neglect with Great Harm, was placed in a pretrial diversion program after pleading not guilty, and was not convicted of this crime. The applicant states that she has already suffered through the death of one of her children but that denial of TPS and her removal from the United States will result in separating her from her two children, for whom she is the only caretaker.

We find that after balancing the positive and negative factors in this case, the positive factors outweigh the negative ones, and the applicant warrants a favorable exercise of the Secretary's discretion. Consequently, the applicant's appeal of the director's decision to withdraw TPS and deny re-registration will be sustained.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

**ORDER:** The appeal is sustained.