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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: FEB 18 2015 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: APPLICANT: [REDACTED]

APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254a

ON BEHALF OF APPLICANT:

[REDACTED]

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,

A handwritten signature in cursive script, appearing to read "Michael Shumway".

f/Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and 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 record reveals that the applicant filed a TPS application during the initial registration period, which had been approved, and subsequently re-registered for TPS on April 25, 2014.

The director denied the re-registration application on August 4, 2014, because the applicant has a felony conviction, and is, therefore, ineligible for TPS. The director determined that the applicant was ineligible for TPS for having been convicted of a felony as evidenced by the final court disposition record for the April 21, 2015 arrest. In a separate decision, the director also denied the current Form I-765, Application for Employment Authorization, because the underlying TPS application had been denied.¹

The record reflects that the applicant responded to a June 4, 2014 request for evidence and that he submitted final court disposition for an April [REDACTED] arrest resulting in conviction for violation of the Florida Litter Law, Florida Statute § 403.413(6c), a third degree felony.

The director may withdraw the status of an alien granted Temporary Protected Status 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. 8 C.F.R. § 244.14(a)(1).

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.

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

¹ On appeal, counsel indicates that she is appealing the denial of both the Form I-821 and the Form I-765, but she filed only one Form I-290B. As there is no appeal available for a denial of a Form I-765, we will treat the appeal as an appeal only of the denial of the applicant’s Form I-821. The AAO exercises appellate jurisdiction only over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003)

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).

On appeal, counsel for the applicant asserts that the director erred in determining that the applicant had been convicted of a felony. She contends that the applicant was never convicted of the “Illegal Dumping” charge for which he was arrested on April [REDACTED] as the record reflects that on March [REDACTED] the case was “Nolle Pros-Comp PT.” Counsel states that “[the applicant] was offered a Pre-Trial Diversion program which he successfully completed and at the conclusion of which the State Attorney’s Office did not bring forth any charges.” Counsel states further, citing *Matter of Ozkok*, 19 I&N Dec 546 (BIA 1988), that “[i]n the State of Florida, under section 944.025(1), when a pretrial program is offered it precedes any pleading by the accused and/or a finding of guilt by the court.” In support, counsel submits a March [REDACTED] Memorandum from the [REDACTED] Pretrial Services Bureau – Diversion Unit, stating that the applicant participated in the Pretrial Diversion Program, that he fully complied and completed all deferred prosecutions requirements; and requesting that “Nolle Prose” be entered in the case.

The issue in this preceding is whether the applicant was and remains convicted of a felony for immigration purposes and is, therefore, ineligible for TPS.

Section 244(c)(2)(B)(i) of the Act provides that an alien shall not be eligible for temporary protected if the Attorney General finds that the alien has been convicted of any felony or 2 or more misdemeanors committed in the United States.

Under section 101(a)(48) of the Act:

- (A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if 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.

(B) 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.

Under the current statutory definition of “conviction” as set forth in section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, does not expunge a conviction for immigration purposes. *See id.* at 523, 528; *see also Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (reiterating that if a conviction is vacated for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains “convicted” for immigration purposes).

In *Matter of Roldan*, the BIA clarified that:

Congress decided that the *Ozkok* definition did not go far enough toward achieving a uniform federal approach and, with the passage of the IIRIRA, provided a statutory definition for the term “conviction,” to be applied to aliens in immigration proceedings. Section 322(c) of the IIRIRA states that the definition applies “to convictions and sentences entered before, on, or after the date of the enactment” of the Act. IIRIRA § 322(c), 110 Stat. at 3009-629.

Therefore, the decision in *Matter of Ozkok* is not controlling, and the definition in section 101(a)(48) of the Act is applicable.

The records from the Circuit Court [REDACTED] – Criminal Division reveal that on July [REDACTED] and again on March [REDACTED] the applicant pled guilty to violation of Illegal Dumping under the Florida Litter Law, Florida Statutes § 403.413(6)(C), a 3rd degree felony. Therefore, although adjudication was withheld and the Court did eventually enter an order of “Nolle-Pro-Comp PT” on March [REDACTED] the requirements for a conviction under section 101(a)(48) were met: the applicant pled guilty and some form of punishment, penalty, or restraint on the applicant’s liberty was imposed. The record also reflects that the applicant spent one (1) day in jail and was required to pay fines and perform community service. For immigration purposes the applicant was and remains convicted of this felony offense under section 101(a)(48) of the Act.

Therefore, the applicant has a felony conviction and is ineligible for TPS pursuant to section 244(c)(2)(B)(i) of the Act. Therefore, the director’s decision to deny the registration application for TPS is 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.

ORDER: The appeal is dismissed.