



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: JUL 24 2015

FILE: [REDACTED]

IN RE: APPLICANT: I [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:

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,



Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Acting Director, Vermont Service Center, denied the application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who is seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. §1254a. The record reveals that the applicant filed for late initial TPS registration on August 10, 2010.

The acting director denied the application on December 19, 2013, finding that the applicant has an aggravated felony conviction and is therefore ineligible for TPS. The acting director determined that the applicant was ineligible for TPS because his [REDACTED], 2007, conviction for endangering the welfare of a child was an aggravated felony.

On appeal the applicant asserts that the acting director erred in determining that he had been convicted of an aggravated felony, citing *James v. Mukasey*, 522 F.3d 250 (2nd Cir. 2008) and *Stubbs v Attorney General*, 452 F.3d 251 (3d Cir. 2005).

The record reflects that on June 13, 2011, USCIS notified the applicant of the intent to deny his application for TPS pending evidence that he met conditions for initial registration, resided in the United States as of February 13, 2001, and had been physically present in the United States from March 9, 2001, until the date of filing. The notice also requested that the applicant submit conviction documents, judgment, pre-sentence investigation report, arrest/police report, and colloquy, and evidence of time spent incarcerated for his arrest on June 3, 2007, in New York. On September 12, 2011, the applicant responded to the request for evidence by submitting evidence sufficient to meet the late filing requirement as well as the residence and physical presence requirements. The applicant also submitted a final court disposition for his [REDACTED] 2007, conviction in the County Court of the County of [REDACTED] New York, under New York Penal Law § 260.10 Endangering the Welfare of a Child, but did not submit the arrest or police report as requested, and claimed that that such reports are inadmissible as hearsay and would be prejudicial.<sup>1</sup>

In addressing the applicant's assertions on appeal we determined that, based on both the nature of the offense and the specific facts and circumstances of the crime, as described in the indictment and plea colloquy, that the applicant has been convicted of a particularly serious crime as it involved harm to the mental, moral, and physical welfare of a child through ongoing sexual contact. We therefore found his conviction renders him ineligible for TPS pursuant to section 244(c)(2)(B)(ii) of the Act.

---

<sup>1</sup> The burden of proof is upon the applicant to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361 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). 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 May 5, 2015, we issued the applicant a notice of our intent to dismiss the appeal for the reasons stated in that notice, and granted the applicant thirty (30) days to respond. No response to the notice of intent to dismiss was received within the allotted time.

As we stated in the notice of intent to dismiss, an alien shall not be eligible for TPS 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). An alien is also ineligible for TPS if found to be inadmissible. *See* Section 244(c)(1)(A)(iii).

Here the record reflects that the applicant has only one misdemeanor conviction, which does not render him ineligible for TPS under section 244(c)(2)(B)(i). Further, even if it were determined that the applicant's conviction was for a crime involving moral turpitude, it would not render him inadmissible because the maximum sentence he faced did not exceed one year and he was sentenced to five months. Thus the applicant would meet the petty offense exception under section 212(a)(2)(A) of the Act, which states, in pertinent part:

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

An alien shall not be eligible for TPS if it is found that he is an alien described in section 208(b)(2)(A)(ii) of the Act who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States. *See* Section 244(c)(2)(B)(ii). A conviction for an aggravated felony would be a particularly serious crime making an alien ineligible for TPS. Section 208(b)(2)(B) of the Act states in part:

(i) Conviction of aggravated felony. - For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

The acting director's decision states that the applicant's conviction makes him ineligible for TPS under section 208(b)(2)(A) of the Act for having been convicted of a particularly serious crime. The director found that the applicant's conviction for Endangering the Welfare of a Child is classified as an aggravated felony as defined under the section 101(a)(43) of the Act, which states:

The term "aggravated felony" means-

(A) murder, rape, or sexual abuse of a minor. . . .

At the time of the applicant's conviction, New York Penal Law stated:

§ 260.10 Endangering the welfare of a child

A person is guilty of endangering the welfare of a child under this statute when:

1. He knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his life or health;

. . . .

Endangering the welfare of a child is a class A misdemeanor.

In our notice of intent to dismiss we noted that as the Second Circuit Court of Appeals found that endangering the welfare of a child under New York Penal Law Section 260.10(1) is categorically not an offense involving sexual abuse of a minor because it did not amount to a sexual crime as defined in 18 U.S.C. § 2252A(b)(1), it is also categorically not rape or sexual abuse of a minor as defined in section 101(a)(43) of the Act and not an aggravated felony. We further noted, however, that although the applicant's conviction does not constitute an aggravated felony, the BIA has held that in order to be considered a particularly serious crime, an offense need not be an aggravated felony under section 101(a)(43) of the Act. *Matter of M-H-*, 26 I&N Dec. 46 (BIA 2012); *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007). The BIA went on to state that once the elements of an offense are found to potentially bring it within the ambit of a particularly serious crime, all reliable information may be considered in determining whether the offense constitutes a particularly serious crime, including the record of conviction and sentencing information as well as other information outside the confines of a record of conviction. *Matter of R-A-M-*, 25 I&N Dec. 657, 659 (BIA 2012); *Matter of N-A-M-*, 24 I&N Dec. at 342.

In the present case, although the applicant was initially charged with rape and sexual abuse of a minor whom he knew to be under the age of [REDACTED] he pleaded guilty only to one count of endangering the welfare of a child, based on an indictment stating he subjected the victim to ongoing sexual contact. In his plea colloquy the applicant admitted to knowing the victim was under 17 years of age, subjecting her to inappropriate physical contact, and knowing that it could be injurious to her mental, moral, or physical welfare.

The BIA found that once the elements of the offense are found to potentially be a particularly serious crime, all reliable information may be considered in making that determination, including



the record of conviction and sentencing information as well as other information outside the confines of a record of conviction. The BIA noted that, as it had set forth in *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986), the proper focus for determining whether a crime is particularly serious is on the nature of the crime. *Matter of N-A-M-*, 24 I&N Dec. 342. In *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014), the BIA stated that the presence or absence of harm to the victim is a pertinent factor in evaluating whether a crime was particularly serious. In the present case the applicant's plea indicates that he was aware his actions could harm the victim, whom he knew was a minor.

As noted above, based on both the nature of the offense and the specific facts and circumstances of the crime, as described in the indictment and plea colloquy, we find that the applicant has been convicted of a particularly serious crime as it involved harm to the mental, moral, and physical welfare of a child through ongoing sexual contact. We therefore find his conviction renders him ineligible for TPS pursuant to section 244(c)(2)(B)(ii) of the Act.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. Here, the applicant has not met that burden.

**ORDER:** The appeal is dismissed.