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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: JUN 11 2015

FILE: [REDACTED]
APPLICATION RECEIPT#: [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:

NO REPRESENTATIVE OF RECORD

INSTRUCTIONS:

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

Thank you,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the applicant's application for Temporary Protected Status. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

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

On July 3, 2014, the director denied the application because the applicant was found to be inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to his drug-related conviction in the United States.

On appeal, the applicant submits an order from the State of New York, County of [REDACTED] and Town of [REDACTED] Criminal Court, which vacated his conviction for possession of a controlled substance and reduced the conviction to disorderly conduct, a violation under New York Law.

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, as defined in section 101(a)(21) of the Act, 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; and
- (f) (1) Registers for TPS during the initial registration period, announced by public notice in the *Federal Register*. . . .

On January 9, 2013, the Secretary of Homeland Security (Secretary) both extended the existing designation of Sudan for Temporary Protected Status (TPS) for 18 months and re-designated Sudan for TPS for 18 months, effective May 3, 2013 through November 2, 2014. Under the re-designation, persons applying for TPS offered to nationals of Sudan (and persons without nationality who last habitually resided in Sudan) must demonstrate that they have continuously resided in the United States since January 9, 2013, and that they have been continuously

physically present in the United States since May 3, 2013, the effective date of the re-designation of Sudan.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC § 802). Section 212(a)(2)(A)(i)(II) 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.

Section 101(a)(48)(B) of the Act provides, "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."

The record reflects that on August 3, 1993, the applicant was convicted upon a plea of guilty of criminal possession of controlled substance in the seventh degree in violation of New York Penal Law § 220.03.¹ The applicant was sentenced to 56 days in jail and was placed on probation for 3 years. On February 19, 2014, the director issued a Request for Evidence (RFE) for the applicant to submit evidence of the specific controlled substance involved and the exact amount he possessed when he was arrested. The director also requested the applicant to provide certified judgment and conviction documents from the court(s) for all arrests. The applicant submitted the requested documents.

Based on the documents submitted, the director determined that the applicant had been convicted of a controlled substance offense, which rendered him inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act. The director found that based on documentation indicating that the offense involved possession of cocaine, no waiver was available for this inadmissibility. The director found the applicant ineligible for TPS based on his controlled substance conviction and denied his TPS application accordingly.

¹ Under New York Law, "[a] person is guilty of criminal possession of a controlled substance in the seventh degree when he or she knowingly and unlawfully possesses a controlled substance."... Criminal possession of a controlled substance in the seventh degree is a class A misdemeanor. N.Y. Penal Law § 220.03 (McKinney 1993).

On appeal, the applicant submits a court order dated August 27, 2014, issued by The State of New York, County of [REDACTED] Criminal Part, which vacated the same court's [REDACTED] 1993 conviction of the applicant for a violation of N.Y. Penal Law § 220.03. The court ordered the conviction charge of violation of N.Y. Penal Law § 220.03 be reduced to disorderly conduct, a violation of § 240.20 N.Y. Penal Law.² The court order was issued based upon the applicant's motion before the court for an order pursuant to section 440.10 of The New York Criminal Procedure to vacate his prior conviction for violating the controlled substance law of the United States. The Board of Immigration Appeals (BIA) has held that 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, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528.; *See also Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (finding that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes). In the present matter, the applicant's guilty plea and conviction for possession of a controlled substance were not vacated by operation of a state rehabilitative statute, but rather pursuant to section 440.10 of The New York Criminal Procedure, which provides that a court may vacate a judgment based on a procedural or substantive defect in the underlying criminal proceedings.³

The applicant has established that he now has one conviction for disorderly conduct, a violation

² "[A] person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: he engages in fighting or in violent, tumultuous or threatening behavior; or he makes unreasonable noise; or . . . he creates a hazardous or physically offensive condition by any act which serves no legitimate purpose." Disorderly conduct is a violation. N.Y. Penal Law § 240.20 (McKinney 2014).

³ At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground(s) that: The court did not have jurisdiction of the action or of the person of the defendant; or the judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor; or material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false; or material evidence adduced by the people at a trial resulting in the judgment was procured in violation of the defendant's rights under the constitution of this state or of the United States; or . . . new evidence has been discovered since the entry of a judgment . . ., which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant. . . N.Y. Crim. Proc. Law § 440.10 (McKinney 2012).

under the New York Penal Law. Because the applicant does not presently stand convicted of any offense related to a controlled substance, he is no longer inadmissible to the United States. The record indicates that the applicant has not been convicted of any other crime in the United States that will render him ineligible for TPS.⁴

The applicant is no longer inadmissible under section 212(a)(2)(A)(i)(II) of the Act, and the record establishes that he meets the other requirements for TPS under section 244(c) of the Act, including nationality of a foreign state designated under section 244(b) of the Act and continuous residence and physical presence during the requisite period. He is therefore eligible for TPS. The director's decision will be withdrawn and the appeal 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.

⁴ Certain violations and traffic infractions, including disorderly conduct in violation of N.Y. Penal Law § 240.20, are not considered "crimes" under New York state law, do not constitute misdemeanors or felonies, and may not be punished by more than 15 days of imprisonment. *See* N.Y. Penal Law §§ 10.00(2) and (3). Pursuant to a USCIS memorandum, for adjudication of TPS applications, these New York offenses should not be considered disqualifying misdemeanors. *See* "Temporary Protected Status (TPS) adjudications involving New York traffic infractions or New York violations," Memorandum from Donald Neufeld, Associate Director, Service Center Operations, and Perry J. Rhew, Chief, Administrative Appeals Office, dated January 17, 2010.