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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

[REDACTED]

DATE: **MAY 20 2015**

[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 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) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

f. Ron Rosenberg

Ron Rosenberg
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Honduras 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 filed to re-register for TPS on May 13, 2013.

The director withdrew TPS and denied the re-registration application on July 21, 2014, because the applicant had not responded to a Notice of Intent to Deny his re-registration application and withdraw his TPS and because the applicant has been convicted of a felony.

On appeal, the applicant does not dispute his conviction. He asserts, however, that he is seeking post-conviction relief due to ineffective counsel at the time of his conviction. With the appeal the applicant submits a copy of a Petition for Relief From Sentence filed with the Circuit Court for ██████████ County, Alabama.

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 record reflects that on March 10, 2005, the applicant was convicted in the Circuit Court of ██████████ County, Alabama, of Theft of Property in the Second Degree, a felony, for events that occurred on September 29, 2004. The applicant was sentenced to three years in prison, with three years suspended, and three years of supervised probation in addition to a \$75 fine.¹ The director noted that the conviction is a felony in the State of Alabama, and that under section 101(a)(43)(G) of the Act it is an aggravated felony.

¹ The director’s decision states that the applicant was convicted on September 16, 2005. However, court records indicate the applicant entered a plea of guilty on March 10, 2005, and was sentenced on September 16, 2005.

Section 244(c)(2) of the Act states:

B) Aliens ineligible.-An alien shall not be eligible for temporary protected status under this section if the Attorney General finds that-

(i) the alien has been convicted of any felony or 2 or more misdemeanors committed in the United States, or

(ii) the alien is described in section 208(b)(2)(A) .

Section 208(b)(2)(A) states:

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

Section 208(b)(2)(B) states:

(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.

INA section 101(a)(43) states:

The term "aggravated felony" means-

....

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least 1 year;

With the appeal the applicant submits a brief in which he asserts that at the time he pled guilty to the charge of Theft of Property he was deprived of the effective assistance of counsel because neither defense counsel nor the court advised him of the adverse immigration consequences that would follow his conviction. The applicant cites *Padilla v Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), where the Supreme Court held that criminal defense counsel is required to advise a noncitizen defendant regarding the immigration consequences of a guilty plea, and without such advice a noncitizen may raise a claim of ineffective assistance. The applicant also cites *Chaidez v. United States*, 133 S. Ct. 1103 (2013) where the court held that the *Padilla* ruling would not be applied retroactively. The applicant states that Alabama courts have yet to rule on the issue of retroactivity under *Padilla*. The applicant states that on August 15, 2014, he filed a petition for relief from sentence pursuant to Rule 32, Alabama Rules of Criminal Procedure. The applicant asks that his TPS re-registration application be remanded to the director to issue a decision after the Alabama court rules on his petition.

As noted above, section 244(c)(2)(B)(i) of the Act provides that an alien shall not be eligible for temporary protected status if the Attorney General finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States. 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 Board of Immigration Appeals (BIA) has determined that a pending collateral attack on a conviction does not disturb the finality of the conviction for immigration purposes. *See Matter of Montiel*, 26 I&N Dec. 555, 557 n.2 (BIA 2015) (distinguishing a direct appeal from cases involving a pending post-conviction motion to collaterally attack a conviction, which does not generally have a bearing on finality); *Matter of Cardenas Abreu*, 24 I&N Dec. 795, 797-98 (BIA 2009) (holding that, for immigration purposes, a conviction must be final, meaning that no direct appeal is pending), *vacated*, *Abreu v. Holder*, 378 F. App'x 59 (2d Cir. 2010); *Matter of Ponce De Leon*, 21 I&N Dec. 154, 156-57 (BIA 1996, 1997; A.G. 1997) (recognizing that the availability of post-conviction motions or other forms of collateral attack does not affect the finality of a conviction for immigration purposes unless the conviction has been overturned).

In the present case the applicant states that he is seeking post-conviction relief due to ineffective assistance of counsel. There is no indication in the record, including the court records provided, that the conviction has been overturned for a violation of constitutional or statutory rights in the underlying criminal proceedings, and it appears the matter is still pending before the Circuit Court for [REDACTED] Alabama. For immigration purposes the applicant remains convicted under section 101(a)(48) of the Act.

Therefore, the applicant is ineligible for TPS because of his conviction. Section 244(c)(2)(B)(i) and (ii) of the Act and 8 C.F.R. § 244.4(a). Therefore, the director's decision to deny the application for this reason will be affirmed.

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 not been met.

ORDER: The appeal is dismissed.