



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **JUN 18 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. § 1254

ON BEHALF OF APPLICANT:

[Redacted]

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,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, withdrew the applicant's Temporary Protected Status. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who was granted Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254a. On September 2, 2014, the director withdrew TPS because the applicant had been convicted of two misdemeanors in the United States. The director also found the applicant to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude.

On appeal, citing to *Padilla v. Kentucky*, 130 S. Ct. 1473 (U.S. 2010),¹ counsel asserts that the applicant's former attorney failed to advise her of the immigration consequences of a guilty plea. Counsel also asserts that the applicant's crimes do not meet the definition of a misdemeanor under 8 C.F.R. § 244.1, as she only served two days in jail. Accordingly, counsel states that the applicant is entitled to maintain TPS.

The director may 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. 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).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under the term "felony" of this section. 8 C.F.R. § 244.1. For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. *Id.*

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.

¹ In *Padilla v. Kentucky*, the Supreme Court ruled that a lawyer representing an alien in connection with a guilty plea to a criminal offense has a constitutional duty to advise the alien about the risk of deportation arising from the conviction.

The record contains court documentation from the Criminal Court for [REDACTED] Texas which reflects the following:

1. On [REDACTED] 2000, the applicant was charged with violating Texas Penal Code § 31.03, theft \$50-\$500. On [REDACTED], 2000, the applicant pled guilty to and was adjudged guilty of violating this Class B misdemeanor offense. The applicant was sentenced to serve two days in jail (credited) and ordered to pay a fine and court costs.
2. On [REDACTED] 2014, the applicant was charged with violating Texas Penal Code § 31.03, theft \$50-\$50. On [REDACTED] 2014, the applicant pled guilty to this Class B misdemeanor offense. Adjudication of guilt was deferred and the applicant was placed on probation for six months and ordered to pay a fine and court costs.

The regulation states that a misdemeanor is a crime “punishable by imprisonment for . . . one year or less, regardless of the term . . . actually served.” Likewise, the regulation states that a criminal violation will not be considered a misdemeanor only if it is “punishable by imprisonment for a maximum term of five days or less.” As such, a misdemeanor is defined under the regulation by the maximum imprisonment possible for the crime under Texas law. In this case, the applicant was convicted of offenses punishable by up to 180 days incarceration,² which meets the definition of a misdemeanor for immigration purposes.

The applicant is ineligible for TPS due to her two misdemeanor convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

The applicant is also inadmissible based on her convictions of crimes involving moral turpitude. In order to be eligible for TPS, an alien must be admissible as an immigrant. Section 244(c)(1)(A)(iii) of the INA.

Section 212(a)(2) of the Act states, in pertinent part:

Criminal and related grounds. —

(A) Conviction of certain crimes. —

- (i) In general. — Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of —

- (I) a crime involving moral turpitude (other than a purely

²Texas Penal Code § 12.22 describes the punishment for a Class B Misdemeanor.

political offense) or an attempt or conspiracy to commit such a crime, or

- (ii) Exception. – Clause (i)(I) shall not apply to an alien who committed only one crime if-
 - (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
 - (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).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

Texas Penal Code § 31.03 defines theft as:

- (a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.
- (b) Appropriation of property is unlawful if:
 - (1) it is without the owner's effective consent;
 - (2) the property is stolen and the actor appropriates the property knowing it was stolen by another; or
 - (3) property in the custody of any law enforcement agency was explicitly represented by any law enforcement agent to the actor as being stolen and the actor appropriates the property believing it was stolen by another.

The BIA has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). *See also, In re Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006) (In determining whether theft is a crime of moral turpitude, the BIA considers "whether there was an intention to permanently deprive the owner of his property.")

The offense of theft in Texas contains the element of unlawful appropriation of property with intent to deprive the owner of property, and the Texas courts have found that this requires a permanent deprivation. *See, e.g., Ellis v. State*, 714 S.W.2d 465, 475 (Tex. App. 1st 1986). The applicant is, therefore, also inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act due to her convictions for crimes involving moral turpitude.

Counsel, on appeal, asserts that the applicant was not advised by her former attorney of the immigration consequences of a guilty plea. However, no evidence has submitted with this appeal to support counsel's assertion and the assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

It is noted that the applicant cannot pursue a vacatur of the conviction of September 21, 2000 pursuant to *Padilla v. Kentucky* 130 S. Ct. 1473 as the Supreme Court ruled that its decision does not apply retroactively. *See Chaidez v. U.S.*, 133 S. Ct. 1101 (2013). There is further no indication that the applicant's 2014 conviction has been vacated. Without certified evidence from the court indicating that the convictions have been vacated for underlying procedural defects having to do with the merits of the case, the offenses remain valid convictions for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

There is no waiver available to an alien found inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Section 244(c)(2)(A)(iii) of the Act, 8 C.F.R. § 244.3(c)(1), for convictions of crimes involving moral turpitude, or under section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a), for

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NON-PRECEDENT DECISION

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two misdemeanor convictions. Consequently, the director's decision to withdraw TPS on these grounds will be affirmed.

The appeal is dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. 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.