



Advisory for Haitian Nationals Considering Applying for TPS

Past Criminal Dispositions/Conduct Could Bar TPS Eligibility and Lead to Detention and Deportation

After the January 12, 2010 earthquake in Haiti, the U.S. government designated Haiti as a country experiencing “extraordinary and temporary conditions” that prevent its nationals from returning to the country safely (see Federal Register Doc. 2010-1169, filed 01/20/2010 and posted at http://www.federalregister.gov/OFRUpload/OFRData/2010-01169_PI.pdf). As a result, Haitian nationals may apply for what is called Temporary Protected Status (TPS) in order to avoid removal from the United States and to obtain employment authorization. However, Haitian nationals who have ever been arrested for a crime should know that past criminal dispositions may make them ineligible for TPS (and that future criminal dispositions may make them ineligible for re-registering for such benefits later). In addition, those who may be ineligible under these criminal bars should know that applying for TPS status may lead not only to a denial of TPS status, but to possible immigration detention and deportation. Therefore, Haitian nationals with past criminal dispositions should seek expert legal advice before applying for TPS.

Past criminal dispositions or conduct that could lead to a finding of ineligibility for TPS:

- ✓ **Conviction of any “felony”** – TPS is barred to any individual who has been convicted of any felony committed in the United States (see INA 244(c)(2)(B)(i) and 8 C.F.R. 244.4(a)). The regulations define a “felony” for this purpose to be any crime “punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served” (see 8 C.F.R. 244.1). But if the offense is defined by the state as a misdemeanor and the sentence actually imposed is one year or less regardless of the term such alien actually served, the crime shall be treated as a misdemeanor for TPS eligibility purposes (see below).

- ✓ **Conviction of two or more “misdemeanors”** – TPS is also barred to any individual who has been convicted of two or more misdemeanors committed in the United States (see INA 244(c)(2)(B)(i) and 8 C.F.R. 244.4(a)). The regulations define a “misdemeanor” for this purpose to be any crime “punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served,” unless the crime is punishable only by a maximum term of five days or less (see 8 C.F.R. 244.1). The term “misdemeanor” also includes a crime punishable by imprisonment for longer than one year but nevertheless defined by the state as a misdemeanor, as long as the sentence actually imposed is one year or less (see above).

Note that this definition of misdemeanor could be read to encompass certain state law violations that are not deemed crimes under state law, as long as state law provides for the possibility of a sentence in excess of five days. However, such a disposition may not qualify as a criminal “conviction” (see *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004), which held that an Oregon finding of guilt of a non-criminal violation is not a “conviction” where the finding did not meet constitutional

requirements for a criminal conviction, including a “beyond a reasonable doubt” standard of proof). Moreover, the Department of Homeland Security (DHS) has recently instructed its staff that certain New York non-criminal violations should not be considered disqualifying misdemeanors even where the maximum potential sentence exceeded five days and the disposition involved a “beyond a reasonable doubt” standard of proof (see DHS Memorandum, “Temporary Protected Status (TPS) adjudications involving New York traffic infractions or New York violations,” dated January 17, 2010, posted at <http://www.immigrantdefenseproject.org/webPages/crimImmNews.htm>). DHS determined that deeming such New York dispositions as disqualifying an individual for TPS “would be in tension with the humanitarian purpose of the TPS program and would lead to incongruous results.” It remains unclear whether DHS will apply this reasoning to similar non-criminal dispositions in other states.

- ✓ **Conviction or admission of a single misdemeanor or lesser violation of law that falls within controlled substance or crime involving moral turpitude inadmissibility ground** – TPS is also barred to any individual who has been convicted of, or who has admitted to, only one misdemeanor or lesser violation if the conviction/admission makes the individual inadmissible (see INA 244(c)(1)(A)(iii) and 8 C.F.R. 244.2(d)) under one of the following grounds:

- Conviction or admission of any controlled substance offense (see INA 212(a)(2)(A)(i)(II)).
- Conviction or admission of a crime involving moral turpitude (see INA 212(a)(2)(A)(i)(I)) not subject to the petty offense exception for an offense for which the maximum potential sentence does not exceed one year and for which the sentence of imprisonment actually imposed does not exceed six months (see INA 212(a)(2)(A)(ii)(II)), and not subject to the juvenile offense exception (see INA 212(a)(2)(A)(ii)(I)).

The regulations provide that these inadmissibility grounds may not be waived for TPS purposes (see 8 C.F.R. 244.3(c)(1)). However, the statute indicates Congressional intent to provide a waiver for a single offense of simple possession of thirty grams or less of marijuana (see INA 244(c)(2)(A)(iii)(II)).

- ✓ **Conduct that falls within a crime-related inadmissibility ground even without a conviction or admission** – TPS may also be barred to any individual who is found to have engaged in conduct that makes the individual inadmissible under certain crime-related grounds, including but not limited to the following (see generally INA 212(a)):

- Government knowledge or reason to believe that the individual is or has been an illicit trafficker in a controlled substance
- Drug abuse or addiction
- Prostitution and commercialized vice
- Immigration fraud
- Alien smuggling
- Falsely claiming citizenship

Many of these conduct-based inadmissibility grounds may be waived “for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest” (see INA 244(c)(2)(A)(ii) and 8 C.F.R. 244.3(b)). But the ground of government knowledge or reason to believe that the individual is or has been an illicit trafficker in a controlled substance may not be waived (see INA 244(c)(2)(A)(iii) and 8 C.F.R. 244.3(c)(1)).

- ✓ **Conviction or conduct that falls within a bar to asylum eligibility** – TPS is also barred to any individual who has been found to: have participated in the persecution of another person, have been convicted of a “particularly serious crime,” have committed a serious nonpolitical crime outside the United States, or constitute a danger to the security of the United States (see INA 244(c)(2)(B)(ii) and 208(b)(2)(A)).

For further information:

For the latest legal developments or support on the issues discussed in this advisory, contact the Immigrant Defense Project at 212-725-6422.