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What Massachusetts Practitioners Need to Know About Criminal Bars to Temporary Protected Status

A potential applicant for Temporary Protected Status (“TPS”) must be aware of the consequences that her criminal history will have on her application for TPS and her immigration status in general. In addition, because TPS must be renewed regularly, a noncitizen risks losing her TPS status and facing removal if she becomes ineligible for TPS. Aside from the general inadmissibility bars that affect applicants, TPS has additional limitations on eligibility for those with criminal records. This memorandum discusses the consequences of criminal conduct on eligibility for TPS.

Grounds of Inadmissibility

Non-waivable criminal conduct

Under INA §244(c)(2)(iii)ⁱ, several grounds of inadmissibility relating to criminal conduct cannot be waived. Thus, a noncitizen who falls into any of the following categories is not eligible for TPS:

The grounds below require a conviction (or admission of acts which constitute essential elements) to constitute an inadmissible offense:

- A noncitizen convicted of a crime involving moral turpitude, INA §212(a)(2)(A)(i)(I), except if:
 - the maximum possible penalty for the offense does not exceed one year and the noncitizen’s actual sentence of imprisonment did not exceed 6 months; or
 - the noncitizen was under 18 when she committed the crime, and it occurred more than five years before her application for admission to the U.S.;
- A noncitizen convicted of a violation of any controlled substance law or regulation. INA §212(a)(2)(A)(i)(II); and
- A noncitizen convicted of multiple offenses for which the aggregate sentences of incarceration equaled 5 years or more. INA §212(a)(2)(B).

The following grounds of inadmissibility do not require a conviction:

- A noncitizen who the Attorney General knows or has to reason to believe is a drug trafficker, one who aids in drug trafficking, or is the spouse, son or daughter of a drug trafficker who received financial benefit from the drug trafficking activities. INA §212(a)(2)(C); and
- A noncitizen who has engaged in or intends to engage in espionage, terrorism, genocide, persecution or torture. INA §212(a)(3).

Waivable criminal conduct

Some grounds of inadmissibility may be waived for humanitarian purposes, to ensure family unity, or for other public interest reasons. The most common categories of criminal conduct that can be waived are:

- Engaging in prostitution, INA §212(a)(2)(D);
- Drug abuse or addiction, INA §212(a)(1)(A)(iv);
- Fraud, INA §212(a)(6)(C); and
- Smuggling, INA §212(a)(6)(E).

Because these grounds of inadmissibility must be waived to be eligible for TPS, the applicant must file an I-601 application for waiver with his TPS application. 8 C.F.R. §244.3(b).

Additional Criminal Bars to TPS

Even if a TPS applicant is admissible, he may still be ineligible for TPS if he has been convicted of any one of the following:

- one felony, as defined below, including Massachusetts misdemeanors where the sentence actually imposed (committed or suspended) is more than one year of incarceration, INA §244(c)(2)(B)(i);
- two misdemeanors, as defined below, INA §244(c)(2)(B)(i); or
- a “particularly serious crime” that makes him a danger to the community, INA §§ 244(c)(2)(B)(ii); 208(b)(2)(A)(ii). For a discussion of the types of offenses that constitute particularly serious crimes, please refer to *Matter of N-A-M-*, 24 I.&N. Dec. 336 (BIA 2009); *Matters of Y-L-, A-G-, and R-S-R-*, 23 I.&N. Dec. 270 (A.G. 2002).

A felony is any crime punishable by more than a year of incarceration, unless the crime is defined by the state as a misdemeanor and the actual term of imprisonment is one year or less. 8 C.F.R. §244.1.

A misdemeanor is defined as any crime punishable by a term of imprisonment of between 6 days and one year. A crime that carries a maximum punishment of five days or less of incarceration is neither a felony nor a misdemeanor. 8 C.F.R. §244.1.

Notably, even minor traffic offenses in Massachusetts are considered misdemeanors. For example, operating with a suspended license carries a possible term of imprisonment of ten days for the first offense. M.G.L. c. 90, §23. On the other hand, a first or second offense of shoplifting in Massachusetts in which the retail value of the goods is less than \$250 is neither a felony nor a misdemeanor because the offense is punishable only by a fine. M.G.L. c. 266, §30A. It would also be considered a petty offense; thus, it would not make a noncitizen inadmissible as a crime involving moral turpitude if it is the only offense on his record.ⁱⁱ

Conclusion

A TPS applicant or grantee faces very serious consequences if her application is denied or she is unable to renew TPS, particularly if the reason is due to her criminal history. Aside from being placed in removal proceedings, noncitizens with criminal records are also often subject to mandatory detention. INA §236(c). Mandatory detainees are likely to be arrested by Immigration & Customs Enforcement and detained until the completion of their removal proceedings. Consequently, it is very important that you gather all available information about a noncitizen's criminal record prior to filing any applications for TPS with the Department of Homeland Security.

For additional information or questions about criminal bars to TPS, please contact the CPCS Immigration Impact Unit at iiu@publiccounsel.net or (781) 338-0825.

ⁱ The citations in this memo refer to the Immigration and Nationality Act of 1952, as amended ("INA"). The INA has been codified and corresponding citations can be found at 8 U.S.C. §1101 et seq. Although some case law uses parallel citations, most immigration practitioners and judges continue to cite to the INA.

ⁱⁱ Note that a third offense of shoplifting, as well as any shoplifting offense in which the value of the goods exceeds \$250, are crimes of moral turpitude that do not qualify for the petty offense exception, and are also misdemeanors punishable by more than a year in jail.