



January 21, 2011

AFM Update AD11-21

Memorandum

SUBJECT: Temporary Protected Status Adjudications Involving “No Jail” or “No Incarceration” Certifications, and Reminder for Cases Involving Certain Potential Misdemeanors Revisions to the *Adjudicator’s Field Manual (AFM)* Chapter 38.1(e)(12)
AFM Update AD11-21

Purpose

This memorandum provides guidance for adjudication of Temporary Protected Status (TPS) applications and administrative appeals in cases involving certain offenses where a state or local court has issued a “no jail” or “no incarceration” certification related to the offense. In addition, this memorandum reminds adjudicators to take TPS cases to USCIS counsel for further review and guidance where it appears that the applicant may be ineligible for TPS on the basis of two misdemeanors as defined by 8 C.F.R. § 244.1, but where one or more of the offenses at issue is not classified as a misdemeanor by the particular state or local jurisdiction. This memorandum also updates Chapter 38.1(e)(12) of the *Adjudicator’s Field Manual (AFM)* regarding TPS ineligibility grounds.

Guidance

I. “No Jail” or “No Incarceration” Certifications

A legal issue has been presented regarding whether certain categories of minor offenses fall outside the definition of a misdemeanor contained in 8 C.F.R. § 244.1 for purposes of TPS. Specifically, a legal question has been raised whether an offense certified as “no jail” or “no incarceration” in a Florida case qualifies as a misdemeanor under the regulation. One of the several grounds of ineligibility for TPS is the conviction of two or more misdemeanors, as defined in § 244.1, committed in the United States. 8 C.F.R. § 244.4(a). The definition of a misdemeanor for TPS purposes is contained in 8 C.F.R. § 244.1, which states:

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” in [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 felony or misdemeanor.

The Department has concluded that a Florida “no jail” or “no incarceration” certification, issued pursuant to Rule 3.994 of the Florida Rules of Criminal Procedure, fundamentally changes the maximum possible sentence for an offense by removing the possibility of incarceration for that offense. As a result, the Department has further concluded that an offense with such a certification, unless withdrawn pursuant to Rule 3.111(b)(1)(C) of the Florida Rules of Criminal Procedure, does not meet the definition of a misdemeanor under 8 C.F.R. § 244.1 because it would not constitute an offense punishable by imprisonment.

If an applicant presents evidence that another state or locality has issued a “no jail,” “no incarceration,” or “no imprisonment” type certification for an offense that may be relevant to his or her TPS request, adjudicators must bring the case to the attention of USCIS counsel so that it can be determined whether, given the particular nature of such a certification and the relevant laws, it means that the offense does not qualify as a misdemeanor under 8 C.F.R. § 244.1.

II. Certain Offenses Not Considered “Misdemeanors” Under State and Local Laws

As instructed during recent TPS trainings, adjudicators are reminded that they are to request USCIS counsel to review any case where it appears that the applicant may be ineligible for TPS on the basis of two misdemeanors, as defined by 8 C.F.R. § 244.1, but where one or more of the offenses at issue is not classified as a misdemeanor by the state or local jurisdiction involved. These cases present issues requiring legal determinations. In some cases, the offense(s) may ultimately be determined to be a misdemeanor for TPS purposes, but there may be other cases where either the particular offense does not meet the requirements for a “crime,” which is the initial requirement in the TPS misdemeanor definition, or other considerations apply. *See, e.g.*, “Temporary Protected Status (TPS) adjudications involving New York traffic infractions or New York violations,” Memorandum from Donald Neufeld, Associate Director, USCIS Service Center Operations and Perry J. Rhew, Chief, USCIS Administrative Appeals Office, dated January 17, 2010. Officers are advised that this reminder to seek USCIS counsel advice in these types of cases applies to all states and localities.

Field Guidance and AFM Update, Chapter 38.1(e)(12)

Chapter 38.1(e)(12)(Grounds for Ineligibility) of the AFM is updated to add the following new subsection G:

“He or she has been convicted of two or more misdemeanors, as defined by 8 C.F.R. § 244.1, committed in the United States. (Section 244(c)(2)(B)(i) of the Act; 8 C.F.R. 244.4(a)). In determining whether an applicant has been convicted of two or more misdemeanors, adjudicators should also refer to the guidance memoranda entitled “Temporary Protected Status adjudications involving “No Jail” or “No Incarceration” Certifications, and Reminder for cases involving certain potential misdemeanors,” dated January 21, 2011; and “Temporary Protected Status (TPS) adjudications involving New York traffic infractions or New York violations,” Memorandum from Donald Neufeld, Associate Director, USCIS Service Center Operations and Perry J. Rhew, Chief, USCIS Administrative Appeals Office, dated January 17, 2010.”

The AFM Transmittal Memoranda table is updated as follows:

AD11-21 January 21, 2011	Chapter 38.1(e)(12)	This memorandum revises AFM Chapter 38.1(e)(12) to provide further guidance on Temporary Protected Status Grounds of Ineligibility.
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Use

This memorandum is intended solely for the instruction and guidance of USCIS personnel in performing their duties relative to adjudications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner. In addition, the instructions and guidance in this memorandum are in no way intended to and do not prohibit enforcement of the immigration laws of the United States.

Contact information

Questions arising within Service Center Operations and the Administrative Appeals Office should be directed through appropriate channels to their respective Headquarters offices.