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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 11 2005
[WAC 02 044 50157]

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]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center, and 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 is seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director determined that the applicant was ineligible for TPS because he had been convicted of a felony committed in the United States. The director, therefore, denied the application.

On appeal, counsel submits a statement and additional evidence.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an alien who is a national of a foreign state designated by the Attorney General is eligible for temporary protected status only if such alien establishes that he or she:

- (a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign state designated under section 244(b) of the Act;
- (b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;
- (c) Has continuously resided in the United States since such date as the Attorney General may designate;
- (d) Is admissible as an immigrant except as provided under section 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f)
 - (1) Registers for TPS during the initial registration period announced by public notice in the *Federal Register*, or
 - (2) During any subsequent extension of such designation if at the time of the initial registration period:
 - (i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;
 - (ii) The applicant has an application for change of status, adjustment of status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;
 - (iii) The applicant is a parolee or has a pending request for reparole; or
 - (iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.

Pursuant to section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a), an alien shall not be eligible for temporary protected status if the Attorney General, now, the Secretary of the Department of Homeland Security (the Secretary), finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States.

8 C.F.R. § 244.1 defines "felony" and "misdemeanor:"

Felony means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except 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 such alien actually served. Under this exception for purposes of section 244 of the Act, the crime shall be treated as a misdemeanor.

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.

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 applicant furnished with his TPS application an order of the Superior Court of California, City and County of San Francisco, expunging the applicant's October 20, 1993, felony conviction of violation of section 186.22(a) PC (participating in a criminal street gang). Despite this expungement order, the director concluded that the applicant was ineligible for TPS based on his felony conviction. The director cited *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), wherein the Board of Immigration Appeals held that under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute.

On appeal, counsel asserts that the applicant had this conviction expunged, a benefit usually only extended to those convicted of misdemeanors, and that upon closer review, the applicant learned that the expunged conviction was in fact a felony. She states that the applicant "has nunc pro tunc reduced his 1993 conviction from the felony it apparently always was to the misdemeanor he thought it was. A certified copy of the court's order dated February 11, 2004 is attached. By its own terms, the order takes effect on March 4, 1997."

The order of the Superior Court of California, City and County of San Francisco, dated February 11, 2004, indicates that the applicant, having been convicted of violating section 186.22(a) PC on October 20, 1993, and having been admitted to probation, had fulfilled the conditions of probation for the entire period. The court, therefore, ordered that the applicant's felony conviction be reduced to a misdemeanor "nunc pro tunc" to March 4, 1997 (more than 3 years after the completion of the applicant's probation), the plea of guilty was withdrawn, a plea of not guilty was entered "nunc pro tunc" to March 4, 1997, and the case was dismissed "nunc pro tunc" to March 4, 1997, pursuant to 1203.3(b) PC and 1203.4 PC. It is noted, however, that the applicant failed to submit the complete, actual court disposition of this arrest and subsequent conviction.

As determined by the director, the applicant remains convicted, for immigration purposes, of the felony offense despite the reduction of the felony to a misdemeanor offense and the expungement of the conviction. Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under state law. State rehabilitative actions which do not vacate a conviction on the merits are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan, supra*.

Furthermore, the Federal Bureau of Investigation fingerprint results report, contained in the record of proceeding, reflects the following arrests in San Francisco, California. The court's final dispositions of these arrests are not contained in the record:

- (1) Arrested on May 6, 1990, for robbery in the second degree, 212.5(b) PC.
- (2) Arrested on November 24, 1999, for driving while license suspended, and furnishing tobacco products or smoking paraphernalia to a minor.
- (3) Arrested on February 16, 2000, for furnishing tobacco products or smoking paraphernalia to a minor.
- (4) Arrested on January 27, 2003, for driving under the influence of alcohol/drugs.

Accordingly, the applicant is ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on his felony conviction, and on his failure to provide information necessary for the adjudication of his application. 8 C.F.R. § 244.9(a). There is no waiver available to an alien convicted of a felony or two or more misdemeanors committed in the United States. Accordingly, the director's decision to deny the TPS application will be affirmed.

The burden of proof is upon the applicant to establish that he or she meets the requirements enumerated above and is otherwise eligible under the provisions of section 244 of the Act. The applicant has failed to meet this burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.