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FILE: [REDACTED]
[WAC 01 228 56495]

OFFICE: CALIFORNIA SERVICE CENTER DATE: MAY 02 2005

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: SELF-REPRESENTED

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. The application is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant claims to be 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 denied the application because he found the applicant had been convicted of two or more misdemeanors.

On appeal, the applicant submits a brief and additional evidence.

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

- (a) Is a national of a 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 Temporary Protected Status 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.

An alien shall not be eligible for temporary protected status 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).

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 misdemeanor.

The record reveals the following offenses:

- (1) On April 30, 1982, the applicant was convicted in the Superior Court of California, County of Los Angeles, of theft of property in violation of section 484(a) PC, a misdemeanor. On July 18, 2001, the applicant's conviction on this charge was vacated in the Superior Court of California, County of Los Angeles pursuant to section 1203.4 PC, because he had fulfilled the conditions of probation.
- (2) On August 7, 1982, the applicant was arrested in Los Angeles, California, and charged with hit and run causing death or injury, a felony. The record does not contain any documentation reflecting the final court disposition of this charge.
- (3) On July 6, 2001, the applicant was arrested in Santa Ana, California and charged with one count of driving under the influence of alcohol in violation of section 23152(a) VC, a misdemeanor, and one count of driving under the influence of alcohol with a blood alcohol content of 0.08% or greater in violation of section 23152(b) VC, a misdemeanor. On August 3, 2001, the applicant pled guilty to both counts in the Superior Court of California, County of Orange. (Docket Number [REDACTED])

On appeal, the applicant asserts that the two convictions detailed in No. (3) above both derived from a single incident and represent one misdemeanor conviction rather than two.

The applicant's assertion that the two misdemeanors detailed in No. (3) above arose in a single occasion and, therefore, he was convicted of a single misdemeanor offense, cannot be accepted. The fact that the offenses arose from a common scheme does not preclude them from being counted as separate offenses. The applicant was charged with two separate counts and he pled guilty to two separate offenses. Black's Law Dictionary, 314 (5th Ed., 1979), defines the term "count" to mean a separate and independent claim. It also indicates that the term "count" is used to signify the several parts of an indictment, each charging a distinct offense. Therefore, the applicant has been convicted of two separate and distinct offenses.

Although the applicant's conviction of theft of property detailed in No. (1) above was later vacated, the fact remains that he was convicted of this charge. Congress has not provided any exception for aliens whose convictions have subsequently been vacated at the petition of the defendant under state law. Such state actions that 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*, 22 I&N Dec. 512, (BIA 1999).

It is noted that the record contains a clearance letter from the Superior Court of California, County of Los Angeles, indicating that no criminal record was found for "Alfredo Aguilar," date of birth October 30, 1956, for 1981 or 1982. However, the applicant has not provided any evidence to establish that the applicant's arraignment and trial on the charge detailed in No. (2) above would have been held in the Superior Court of California, County of Los Angeles. Nor has he provided any evidence to establish that prosecution was declined on this charge.

The applicant is ineligible for TPS due to his record of at least three misdemeanor convictions, detailed above. 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the application for this reason will be affirmed.

An alien applying for temporary protected status has the burden of proving 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.

ORDER: The appeal is dismissed.