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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Services

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[Redacted]

FILE: [Redacted] Office: VERMONT SERVICE CENTER

Date:  
**JUL 06 2010**

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the Vermont Service Center. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the Vermont Service Center by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a 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 record reveals that the applicant filed a TPS application during the initial registration period on April 29, 2002. The Director, Vermont Service Center, approved that application on August 8, 2002.

The director may withdraw the status of an alien granted TPS under section 244 of the Act at any time if it is determined that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. 8.C.F.R. § 244.14(a)(1).

The director withdrew the applicant's TPS because the applicant had been convicted of two or more misdemeanors.

On appeal, counsel for the applicant states that the director's decision to withdraw TPS is wrong as a matter of law, the decision should be reversed and the applicant's TPS should be reinstated.

An alien shall not be eligible for TPS 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).

The regulation at 8 C.F.R. § 244.1 defines "misdemeanor" 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. 8 C.F.R. § 244.1.

The record reveals the following offenses:

- (1) On December 10, 2004, the applicant was arrested by the Boston, Massachusetts Police Department for "Operating Under the Influence of Alcohol" and "OUI - Personal Injury" and "Assault." [REDACTED] On March 18, 2005, the court determined that "Sufficient facts found but continued without

guilty finding until March 16, 2006” and the applicant was placed on unsupervised probation for violating General Laws of Massachusetts, Chapter 90/24J, “Operating Under the Influence of Alcohol” and “OUI – Personal Injury” and violating General Laws of Massachusetts, Chapter 265/15A, “Assault,” both misdemeanors.

- (2) On March 22, 2007, the applicant was arrested by the Lawrence, Massachusetts Police Department for “Larceny of Property,” a violation of the General Laws of Massachusetts, Chapter 266/30A. On July 24, 2007, the court determined that “Sufficient facts found but continued without guilty finding until June 22, 2008,” and the applicant was placed on unsupervised probation for this misdemeanor.
- (3) On November 23, 2007, the applicant was arrested by the Boston, Massachusetts Police Department for “Possession of Class D. Drugs.” On February 29, 2008, the court determined that “Sufficient facts found but continued without guilty finding until February 27, 2009,” and the applicant was placed on unsupervised probation for violating General Laws of Massachusetts, Chapter 94C/34G, “Possession of a Class D Drug,” a misdemeanor.

Under the relevant provisions of the Federal First Offender ACT (FFOA), a criminal defendant will not be considered to have a “conviction” for any purpose if the conviction is a first time offense for simple possession of a controlled substance, if they have no prior drug offense convictions, and have not previously been the subject of a disposition under FFOA, and were placed on a term of probation. If the defendant has not violated the terms or conditions of probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. *De Jesus Melendez v. Gonzalez*, 503 F.3d 1019 (9<sup>th</sup> Cir 2007).

In the present case, the applicant has established that he would have qualified for treatment under the FFOA. The applicant entered plea agreement for continuance without a finding a violation of Chapter 94c, Section 34g. The applicant successfully completed his probation and the court dismissed the case. Had the applicant been prosecuted under federal law, 21 U.S.C. section 844, the applicant would have qualified for treatment under the FFOA had he been charged with federal offenses.

The evidence in the record shows that he was not, prior to the commission of the offense, convicted of violating a federal or state law relating to controlled substances and that he was not previously accorded first offender treatment under any law. The applicant has, therefore, established that he is not convicted for immigration purpose of the drug offense.

On appeal, counsel claims that a Massachusetts “continuance without a finding” (CWO) coupled with a period of unsupervised probation does not constitute a conviction for immigration purposes and the director’s decision should be reversed and the applicant’s TPS should be reinstated. However, the General Laws of Massachusetts, Part IV, Chapter 278, Section 18, states, in pertinent part, “...the case be continued without a finding to a specific date thereupon to be dismissed, such continuance conditioned upon compliance with specific terms and conditions or that the defendant be placed on probation pursuant to the provisions of section eight-seven of chapter two hundred and seventy-six.” The General Laws of Massachusetts, Part IV, Chapter 278, Section 18, further states, in pertinent part, “If a defendant, notwithstanding the requirements set forth hereinbefore, attempts to enter a plea or statement consisting of an admission of facts sufficient for finding of guilt, or some similar statement, such admission shall be deemed a tender of a plea of guilty...” The final court dispositions indicate that an “Admission to Sufficient Facts” was determined on all of the above-noted offenses. A CWO is considered a conviction for immigration purposes. *See Griffiths v. INS*, 243 F.3D 45 (1<sup>ST</sup> Cir. 2001). The applicant was placed on unsupervised probation which was a form of punishment, or restraint of his liberty. The Supreme Court recognized probation as a form of punishment or restraint. *See Staples v. United States* 511 U.S. 600, 636 (1994); *United States v. Granderson*, 511 U.S. 39 (1994); *Mistretta v. United States* 488 U.S. 361, 363 (1989); *Hicks v. Feiock*, 485 U.S. 624, 640 (1988) (stating that a fixed term of probation is itself a punishment.)

The applicant is, therefore, ineligible for TPS because of his misdemeanors convictions in numbers one and two above. 8 C.F.R. § 244.4(a). Consequently, the director’s decision to withdraw TPS is affirmed.

An alien applying for TPS 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.