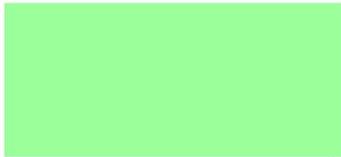




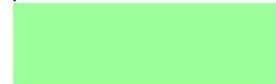
U.S. Citizenship
and Immigration
Services

(b)(6)

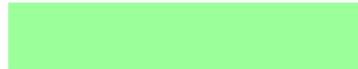


DATE: **MAR 27 2013**

Office: VERMONT SERVICE CENTER

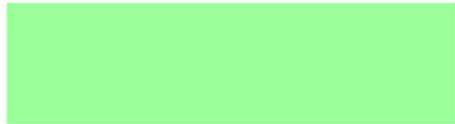


IN RE: Applicant:



APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254

ON BEHALF OF APPLICANT:



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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

(b)(6)

DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The applicant is a native and citizen of El Salvador who was granted Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director withdrew TPS because the applicant had been convicted of a felony in the United States.

On appeal, citing case law, counsel asserts that the applicant has only one misdemeanor conviction.

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).

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).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception 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 actually served. Under this exception, for purposes of 8 C.F.R. § 244 of the Act, the crime shall be treated as a misdemeanor. 8 C.F.R. § 244.1.

"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. 8 C.F.R. § 244.1.

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Act.

The record contains court documentation in Case no. [REDACTED] which indicates that on September 9, 1987, the applicant was convicted of driving with .20 percent or more alcohol in the blood causing bodily injury, a violation of section 23153(b) VC, a felony. The applicant was ordered to serve 255 days in jail

and pay a fine. On August 8, 1993, the conviction was expunged in accordance with section 1203.4 PC. On April 29, 2009, the court ordered the felony conviction be reclassified as a misdemeanor pursuant to section 17(b)(3) PC.

The issue in this proceeding is whether the court's subsequent expungement and reclassification of the applicant's felony conviction as a misdemeanor offense is valid for immigration purposes.

Section 17(b) PC does not serve to dismiss or otherwise vacate a conviction subsequent to the completion of a term of probation. This section defines the range of punishments for both felony and misdemeanor offenses, when the trial court may exercise its discretion in determining the punishment to be imposed under a "wobbler" statute.

Because the reclassification was done pursuant to section 17(b) PC, the court's decision is entitled to full faith and credit for purposes of establishing eligibility for TPS. *Garcia-Lopez v. Ashcroft*, 334 F. 3d 840 (9th Cir. 2003); *Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005). Therefore, the director's finding will be withdrawn.

However, the state court's expungement of the conviction under section 1203.4 PC does not eliminate the immigration consequences of the applicant's conviction. Under the statutory definition of "conviction" at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to reduce, 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. See *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. See also *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes). In *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), it was reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes.

In the instant case, the applicant does not claim any defect in the underlying criminal proceedings. Therefore, the applicant remains convicted of the misdemeanor offense for immigration purposes.

The evidence of record reflects that the applicant has one misdemeanor conviction, and it does not render him ineligible for TPS under the provisions of section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a). There are no other known grounds of ineligibility; therefore, the director's decision to withdraw the applicant's TPS will, itself, be withdrawn, and TPS will be reinstated.

ORDER: The appeal is sustained.