U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: APR 10 2014 Office: VERMONT SERVICE CENTER [redacted]

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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. .

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The AAO will reopen its decision on its own motion. The case will be remanded for further action and consideration.

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. On September 27, 2012, the director withdrew TPS because the applicant had been convicted of two misdemeanors in the United States. The applicant, on appeal, requested additional time to supplement the appeal. The AAO in dismissing the appeal on June 28, 2013, determined that over seven months had elapsed and no additional correspondence has been presented supplementing the appeal. Accordingly, the AAO affirmed the director's findings.

Subsequently, counsel submitted a letter indicating that "copies of application, brief and additional information" were received by U.S. Citizenship and Immigration Services (USCIS) prior to the issuance of the AAO's decision. As evidence, counsel provided copies of the documents that were submitted.

The AAO has determined that additional documents and a brief were received at USCIS within the required timeframe as demonstrated by the receipt date of November 26, 2012. The AAO will *sua sponte* reopen the matter for the purpose of considering the supplemental documentation on appeal. 8 C.F.R. § 103.5(a)(5)(i).

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).

"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.

Section 101(a)(48)(B) of the Act provides, "any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."

In response to the notice issued on July 20, 2012, which requested the applicant to provide certified judgment and conviction documents from the court(s) for all arrests, the applicant submitted:

1. Court documentation from the [redacted] General District Court of the Commonwealth of Virginia, which indicates that on June 4, 2005, the applicant violated section 5-4-1, trespassing. On July 11, 2005, the applicant was found guilty of this Class 1 misdemeanor. The applicant was ordered to pay a fine and court cost. [redacted]

2. Court documentation from the [redacted] General District Court of the Commonwealth of Virginia, which indicates that on June 24, 2007, the applicant violated section 18.2-266, driving while intoxicated with .08% or more blood alcohol level. On October 16, 2007, the applicant pled guilty to the Class 1 misdemeanor offense. The applicant was ordered to pay a fine, ordered to serve 180 days in jail (which was suspended) and was placed on probation for one year. [redacted]

In her brief, counsel asserted that motions have been filed before the [redacted] General District Courts. Citing *Padilla v. Kentucky*, 130 S. Ct. 1473 (U.S 2010), counsel asserts that this case law would have a direct impact on the applicant's convictions. As previously mentioned in our earlier decision, the assertions of counsel, do not constitute evidence, and without certified documentation from the courts indicating that the convictions had been vacated for underlying procedural or constitutional defect having to do with the merits of the case, the misdemeanor convictions continue to effect immigration consequences. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). Counsel further asserted that an application for pardon was going to be filed with the governor's office in Virginia.

In her brief, counsel also asserted that the trespass offense falls outside the definition of a misdemeanor for immigration purposes. Counsel cites to a memorandum issued by USCIS on January 21, 2011, to support her argument that the applicant's trespassing conviction in the Commonwealth of Virginia should not disqualify him from maintaining TPS. Counsel asserted, in pertinent part, "in the trespass case, the judge specifically checked the box "If convicted, no jail sentence will be imposed". This is analogous to the case referred to in the above memorandum."

The cited memorandum provides guidance to certain offenses where the Florida courts have issued "no jail" or "no incarceration" certifications. USCIS determined that an offense with such

certification 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. The memorandum also provides that if another state of locality has issued a "no jail," "no incarceration," or "no imprisonment" type of certification for an offense that may be relevant to the applicant's 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."

A review of the court documentation in Case no. [redacted] indicates that the judge did check the box indicating "[i]f convicted, no jail sentence will be imposed." The record, however, does not contain any evidence that this matter was brought to the attention of USCIS counsel.

As the record is devoid of evidence showing that the procedures outlined in the memorandum of January 21, 2011, had been implemented, the case will be remanded for further adjudication. The director shall then issue a new decision based, in part, upon the conclusion of USCIS counsel.

ORDER: The decisions of the AAO dated June 28, 2013 and of the director dated September 27, 2012 are withdrawn. The case is remanded for further action consistent with the above and entry of a new decision.