

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

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  
and Immigration  
Services**

**PUBLIC COPY**



M1

FILE: [REDACTED]  
[LIN 01 238 52571]

Office: VERMONT SERVICE CENTER

Date:

SEP 25 2009

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 Vermont Service Center. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom  
Acting 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**DISCUSSION:** The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.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 July 30, 2001, under receipt number LIN 01 238 52571. The Director, Nebraska Service Center, approved that application on February 6, 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 TPS because the applicant had been convicted of two or more misdemeanors in the United States. The director also found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

On appeal, the applicant asserts that he only served 90 days in the Davis County Jail as 265 days of his sentence had been suspended. The applicant requests that the AAO view the evidence he has submitted and reconsider his TPS application. The applicant also submits evidence regarding his criminal history.

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. 8 C.F.R. § 244.1.

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act.

The record reveals the following offenses:

- (1) On October 20, 2003, the applicant was arrested by the Davis County, Utah Sheriff's Department for "Lewdness." [REDACTED]

Pursuant to a notice dated May 2, 2008, the applicant was requested to submit the final court disposition for the charge detailed above including any other arrest. The applicant submitted the requested court documents. According to the final court disposition, on July 22, 2004, the applicant pled guilty and was convicted of violating UCA section 76-9-702.5, lewdness involving a child, a Class A misdemeanor. On July 22, 2004, the applicant was sentenced to a term of 365 days in the Davis County Jail with 275 days suspended and ordered to pay a fine. The applicant was placed on probation for three years and ordered to serve 90 days in jail. The applicant's probation condition included sex offender registration under 402 Motion.<sup>1</sup>

On appeal, the applicant submits court documents dated June 12, 2008, from the Second Judicial District Court of Davis County, Utah, reflecting that on May 8, 2008, the applicant's Motion to Enact 402(b) sentence was filed. The court documents indicate that the original plea agreement included a 402 reduction to lewdness, a Class B misdemeanor. The Court ordered the Class A misdemeanor conviction to be reduced to a conviction of lewdness, a Class B misdemeanor.

It is clear from the court's order of June 12, 2008, that the Class A misdemeanor conviction was reduced because the applicant had successfully completed the terms of his sentence and probation. The court's action in this case is a form of post-conviction relief akin to an expungement, vacatur, or dismissal of the charges that is generally not recognized in immigration proceedings, unless the court's action was undertaken to correct a significant procedural or substantive error in the original criminal proceedings.<sup>2</sup> There is nothing in the

---

<sup>1</sup> Utah Code Ann. section 76-3-402 allows the court to enter a judgment of conviction to a lower degree of offense.

<sup>2</sup> The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has ruled that a criminal conviction remains valid for immigration purposes regardless of the effect of a post-conviction type rehabilitative statute unless the conviction was expunged or vacated because of a procedural or constitutional defect in the underlying trial court proceedings. See *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (expunged theft conviction still qualified as an aggravated felony); *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002) (expunged misdemeanor California conviction for carrying a

record, and the applicant has not offered any evidence on appeal to suggest that the Class A misdemeanor was reduced because of a procedural or constitutional defect in the underlying trial court proceedings.

Lewd acts may be a crime involving moral turpitude. *U.S. v. Nunez-Garcia*, 262 F.Supp. 3d 1073 (C.D. Cal. 2003). However, in the instant case, a finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act will not be made at this time as the record does not contain the charging document (indictment or information).

The record contains documentation from State of Utah Department of Public Safety Driver License Division, which indicates that the applicant was convicted of a violation of USC section 41-12a, The Motor Vehicle Responsibility Law, a Class B misdemeanor.

The director withdrew the TPS because the applicant had been convicted of two misdemeanors in the United States.

On appeal, the applicant requests that the AAO reconsider his TPS application. According to the applicant, he is not a danger or threat to the community and is a law-abiding citizen. The applicant's statements made on appeal have been considered. Nevertheless, there is no waiver available, even for humanitarian reasons, of the requirements stated above.

The applicant is ineligible for TPS because of his misdemeanor convictions.

Beyond the director's decision, it is also noted that the record contains a Form I-205, Warrant of Removal and Deportation, dated July 22, 1996. It does not appear that the warrant was executed. However, it presents the possibility that the applicant was deported and returned to the United States, without permission contrary to section 212(a)(9) of the Act. Consequently, the applicant may not have maintained continuous residence or physical presence in the United States during the qualifying period pursuant to 8 C.F.R. §§ 244.2(b) and (c).

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.

---

concealed weapon did not eliminate the immigration consequences of the conviction); *see also de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1024 (9<sup>th</sup> Cir. 2007); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9<sup>th</sup> Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).