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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  
and Immigration  
Services**

M<sub>1</sub>

[Redacted]

FILE: [Redacted] Office: VERMONT SERVICE CENTER

Date:

**DEC 13 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:

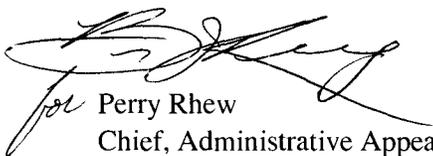
[Redacted]

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 \$630. 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,

  
for 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**DISCUSSION:** The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.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 March 22, 2001. The Director, Texas Service Center, approved that application on March 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 TPS because the applicant had been convicted of a felony.

On appeal, the applicant's former counsel asserted that the applicant was convicted of only one misdemeanor.

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).

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, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC 802). Section 212(a)(2)(A)(i)(II) of the Act.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record reveals the following offense:

- (1) On April 5, 2007, the applicant was arrested by the Houston, Texas Police Department for violating Health and Safety Code Sec. 481.116, "Possession of Controlled Substance." (Docket no. [REDACTED])

Pursuant to a notice dated April 14, 2009, the applicant was requested to submit the final court disposition for the charge detailed above. The applicant submitted the requested court document, which indicated that on April 9, 2007, the applicant pled guilty to the charge of "Possession of a Controlled Substance Cocaine Less than 1 Gram," a felony, and adjudication of guilt was deferred. The applicant was placed on community supervision for 3 years and ordered to pay a \$500.00 fine and \$203.00 in court costs. The director therefore withdrew the applicant's TPS because of his felony conviction.

On appeal, former counsel claims that the applicant has only been convicted of one misdemeanor, and therefore remains eligible for TPS. According to counsel, the director's reading of the definition of felony is clearly erroneous and would undermine the federal scheme. However, according to Health and Safety Code section 481.116, "Possession of a Controlled Substance" is a state jail felony punishable by confinement in a state jail for any term of not more than two years. As stated above, a felony, for immigration purposes, is 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. In this applicant's case, the "Order of Deferred Adjudication" states that the applicant pled guilty to "Possession of a Controlled Substance in violation of section 481.116 of the Texas Health and Safety Code, a felony." Therefore, we find that the applicant was, in fact, convicted of a felony, not a misdemeanor.

Counsel also contends that the definition of felony as defined in 8 C.F.R. § 244.1 is no longer applicable and valid pursuant to the United States Supreme Court holding in *Lopez v. Gonzales*, 549 U.S. 47, 127 S.Ct. 625, 633 (2006). According to counsel, *Lopez* determined that a South Dakota

conviction for aiding and abetting another person's possession of cocaine, while a felony under state law could not be an aggravated felony that barred cancellation of removal because under federal law the conviction is treated as a misdemeanor. Counsel states, "The Service's reading of the definition of felony as defined in Title 8, Code of Federal Regulations part 244.1 and pertaining to Temporary Protected Status barring admission to the United States under section 212(a)(2)(A)(i)(II) of the Act Pursuant to Title 8, Code of Federal Regulations, Part 244.3(c)(1) is clearly erroneous and would undermine the federal scheme." However, *Lopez* clearly relates to aggravated felonies, which is not the issue in the present case. Therefore, counsel's argument is irrelevant.

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if 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.

In the instant case, the court documents submitted reflect that the applicant pled guilty to each offense, and the judge ordered some form of punishment to the charge and a restraint on the applicant's liberty. Therefore, the applicant has been "convicted" of the felony offense for immigration purposes.

Current counsel submits additional copies of the court documents in Docket no. [REDACTED] and asserts that the applicant is in the process of expunging his criminal case.

In this case, there is no evidence in the record to suggest that the felony conviction was overturned on account of an underlying procedural or constitutional defect in the merits of the case. See *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9<sup>th</sup> Cir. 2002); *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). Therefore, despite the pending expungement of the conviction, the offense would remain a valid conviction for immigration purposes.

The applicant is ineligible for TPS because of his felony conviction. 8 C.F.R. § 244.4(a). Accordingly, the director's decision to withdraw TPS is affirmed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Beyond the director's decision, the applicant is also inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to his drug conviction.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.