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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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[REDACTED]

**FEB 23 2010**

FILE: [REDACTED] OFFICE: VERMONT SERVICE CENTER DATE:  
[WAC 01 184 55627]

IN RE: Applicant: [REDACTED]

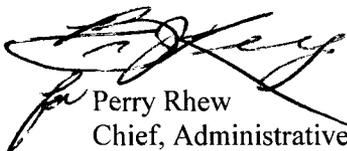
APPLICATION: Application for Temporary Protected Status under Section 244 of the  
Immigration and Nationality Act, 8 U.S.C. § 1254

ON BEHALF OF APPLICANT:  
[REDACTED]

**INSTRUCTIONS:**

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 or reopen, as required by 8 C.F.R. §103.5(a)(1)(i).

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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

The applicant is a native and 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 director withdrew the applicant's TPS because he had been convicted of two misdemeanors in the United States.

On appeal, counsel asserts that applicant's two convictions arose out of a single and common scheme and does not constitute multiple convictions. Counsel asserts that the applicant has had his criminal convictions set aside and dismissed.

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. Section 244(c)(3)(A) of the Act and 8 C.F.R. § 244.14(a)(1).

An alien shall not be eligible for temporary protected status 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. 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 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. 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 FBI report reveals the following offenses in the state of California:

1. On May 29, 1996, the applicant was arrested in Oakland for false identification to a police officer, a violation of section 148.9 PC. The charge was subsequently dismissed.
2. On October 12, 1999, the applicant was arrested by the Los Angeles Police Department for battery on person, a violation of section 243(a) PC.

3. On October 13, 2003, the applicant was arrested by the Los Angeles Police Department for making a criminal threat, a violation of section 422 PC.

In response to a Notice of Intent to Withdraw TPS dated March 19, 2008, the applicant submitted court documentation, which revealed the following:

- On August 9, 1998, the charge of violating section 148.9 PC was dismissed in the Hayward Municipal Court. [REDACTED]
- On January 13, 1999, the prosecution prefiled deferral for number two above.
- On December 9, 2003, the applicant was charged with assault with a deadly weapon/instrument, a violation of section 245(a)(1) PC, and two counts of making a criminal threat, a violation of section 422 PC, all felonies. On January 14, 2004, the applicant was convicted of violating section 245(a)(1) PC and one count of violating section 422 PC. The remaining charge was dismissed. The applicant was placed on formal probation for three years. The applicant was ordered to pay a fine, serve two days in jail and perform 250 hours in the PAAWS Program. The court documentation indicates that upon successful completion in the PAAWS program, the applicant's probationary period would be converted to summary probation and the offenses would be reduced to misdemeanors pursuant to section 17(b)(4) PC. On December 14, 2005, the court ordered the felony offenses to be amended as misdemeanors pursuant to section 17(b)(5) PC. On December 14, 2006, the convictions were expunged in accordance with section 1203.4 PC. [REDACTED]

Counsel's assertion that the offenses arose in a single occasion and, therefore, the applicant was convicted of a single misdemeanor offense, cannot be accepted. The fact that the offenses arose from a common scheme does not preclude them from being counted as separate offenses. The applicant was charged with two separate counts and he pled to separate offenses. *Black's Law Dictionary*, 353 (7<sup>th</sup> Ed., 1999) defines the term "count" to mean a separate and distinct claim in a complaint or similar pleading. It also indicates that the term "count" is used to signify the part of an indictment charging a distinct offense. Therefore, the applicant has been convicted of two separate and distinct offenses.

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the INA, no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).<sup>1</sup> State rehabilitative

<sup>1</sup> 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 (9<sup>th</sup> Cir. 2002)

actions that do not vacate a conviction on the merits as a result of underlying procedural or constitutional defects are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan, id.*

The record before the AAO clearly establishes that the applicant has at least two misdemeanor convictions. In this case, there is no evidence in the record to suggest that either 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 expungements of the convictions, the offenses remain valid convictions for immigration purposes.

The AAO has reviewed counsel's brief on appeal and the authorities cited therein, and conclude that the convictions continue to effect immigration consequences, and thus render the applicant ineligible for TPS. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to withdraw TPS will be affirmed.

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 approval of the TPS application is withdrawn. The appeal from the withdrawal of the TPS application is dismissed.

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(expunged misdemeanor California conviction for carrying a 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).