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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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[REDACTED]

FILE: [REDACTED]

[WAC 01 164 51517]

OFFICE: VERMONT SERVICE CENTER

DATE: MAR 03 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:

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.


for 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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 on appeal. The appeal will be sustained.

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 denied the application because he found the applicant had been convicted of two misdemeanors in the United States.

On appeal, counsel submits court documentation indicating the applicant's conviction has been set aside because he had not been advised of his rights at the time of his guilty plea.

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).

"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 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).

In response to a Notice of Intent to Withdraw TPS issued on April 28, 2009, the applicant submitted court dispositions from the Alameda County Superior Court of California, which revealed the following:

1. On October 20, 2002, the applicant was arrested and subsequently charged with violating section 23103(a) VC, reckless driving, a misdemeanor. On December 16, 2002, the applicant was convicted of this offense. [REDACTED]
2. On July 3, 2008, the applicant was charged with violating section 647(f) PC, public intoxication and section 148.9(a) PC, false identification to a peace officer, both misdemeanors. On July 10, 2008, the applicant was convicted of violating section 148.9(a) PC. [REDACTED]

On appeal, counsel submits court documents in [REDACTED], which reflects that on August 18, 2009, a judgment entry was entered and the applicant's guilty plea was vacated as the "court find advisement of rights was incomplete." The complaint was subsequently amended to include

a violation of section 415 PC, which was deemed an infraction. The applicant pled *nolo contendere* to the infraction offense.

The Board of Immigration Appeals held that a conviction vacated for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes. *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006).

State rehabilitative actions that do not vacate a conviction on the merits are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan*, 22 I&N Dec. 512, (BIA 1999).

In this case, the dismissal of the applicant's conviction in [REDACTED] was vacated on the merits, and was not rehabilitative. Therefore, the applicant was not convicted, for immigration purposes, of the misdemeanor offense of false identification to a peace officer.

The applicant has one misdemeanor conviction and it does not render the applicant 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 the application will be approved.

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 met this burden.

ORDER: The appeal is sustained and the application is approved.