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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 and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 0 6 2010

[EAC 08 003 80364]

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case is now before the Administrative Appeals Office (AAO) on appeal and will be remanded for further consideration and action.

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 director denied the application because the applicant had been convicted of two misdemeanors.

On appeal, counsel for the applicant states that the applicant was convicted of only one misdemeanor and therefore remains eligible for TPS.

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.

The record reveals that on August 8, 1998, the applicant was arrested by the Placentia [California] Police Department for "Obstructing Peace Officer," "Assault," and "Battery." [redacted] According to the court disposition provided by the applicant, on October 19, 1998, the applicant was convicted of "Assault" and Resist Arrest," both misdemeanors.

The director denied the application because the applicant had been convicted of two misdemeanors

On appeal, counsel claims that the applicant had only been convicted of one misdemeanor because the "Resist Arrest" conviction had been withdrawn. Section 1016.5 of the California Penal Code states:

> a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.
>
> b) If... the court fails to advise the defendant as required by this section...the court, on the defendant's motion, shall vacate the judgment and permit the defendant to withdraw his plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

Section 1385 of the California Penal Code states:

> (a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

According to counsel, the conviction was dismissed pursuant to California Penal Code Sections 1016.5 and 1385. On appeal, counsel submits the final court disposition. The court found that the applicant's guilty plea was involuntary under California Rule of Criminal Procedure, because he was not advised at the time he entered his plea, that his plea could subject him to deportation pursuant to the laws and regulations governing the Immigration and Nationality Act. Since these orders vacate the convictions on their merits, the applicant is no longer considered to have been "convicted" of the offenses detailed in Nos. 3 and 5 above. *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006). see also *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

The burden of proof is upon the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by United States Citizenship and Immigration Services (USCIS). 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet his or her burden of proof, the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. 8 C.F.R. § 244.9(b). The applicant has met this burden. The record

does not reflect any grounds that would bar the applicant from receiving TPS. There are no other known grounds of ineligibility; consequently, the director's decision will be withdrawn. However, the validity period of the applicant's fingerprint check has expired.

Accordingly, the case is remanded for the purpose of sending the applicant a fingerprint notification form, and affording him the opportunity to comply with its requirements. Thereafter, the director will render a new decision. Should the decision be adverse, the director must give written notice setting forth the specific reasons for the denial pursuant to 8 C.F.R. § 103.3(a)(1)(i).

ORDER: The case is remanded for appropriate action and decision consistent with the foregoing.