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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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DATE: DEC 30 2011 Office: VERMONT SERVICE CENTER

FILE:

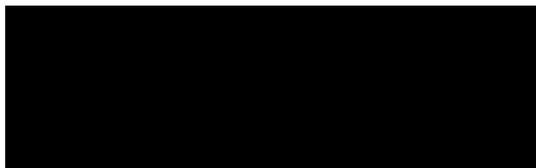


IN RE: Applicant:



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

ON BEHALF OF APPLICANT:

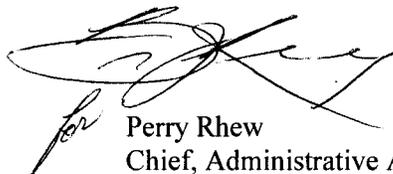


INSTRUCTIONS:

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

The applicant claims to be a native and citizen of Honduras 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 it was determined that the applicant had been convicted of a felony

On appeal, counsel asserts that the director erred in concluding that the felony conviction stands due to lack of a constitutional basis for the re-designation. Counsel asserts that such re-designation is not a vacation of the original conviction, but is more akin to a sentence modification, which does not require a constitutional basis.

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).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception 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 actually served. Under this exception, for purposes of 8 C.F.R. § 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.

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

The record reflects that on May 18, 2002, the applicant was arrested by the Bowling Green Police Department in Kentucky for aggravated assault in the fourth degree a violation of K.R.S. chapter 508.030, a Class A misdemeanor. On May 20, 2002, the applicant entered a plea of

guilty. Based upon constitutional arguments and procedural substantive defects in the proceedings, on July 8, 2010, the Warrant District Court, Division III of the Commonwealth of Kentucky issued an amended order. The court ordered the applicant's guilty plea withdrawn *nunc pro tunc* and the judgment of guilty vacated *nunc pro tunc*. Case no [REDACTED]

The record also reflects that on August 9, 1996, the applicant was convicted of inflicting corporal injury upon a spouse/cohabitant, a violation of section 273.5(a) of the California Penal Code, a felony. The applicant was sentenced to serve 150 days confinement, ordered to pay a fine and was placed on probation for three years. On April 13, 2010, the Superior Court of Ventura County, California ordered the felony conviction be reclassified as a misdemeanor pursuant to section 17(b), of the California Penal Code and the conviction was expunged pursuant to section 1203.4 of the California Penal Code. Case no [REDACTED]

The issue in this proceeding is whether the court's subsequent expungement and reclassification of the applicant's felony conviction as a misdemeanor offense is valid for immigration purposes.

Section 17(b) of the California Penal Code (PC) does not serve to dismiss or otherwise vacate a conviction subsequent to the completion of a term of probation. This section defines the range of punishments for both felony and misdemeanor offenses, when the trial court may exercise its discretion in determining the punishment to be imposed under a "wobbler" statute.

The statute under which the applicant was charged, section 273.5 PC, is a "wobbler", in that it carries a range of punishment from imprisonment in the county jail up to one year or imprisonment in the state prison from two three or four years and/or a fine up to \$6,000. Because the reclassification was done pursuant to section 17(b) PC, the court's decision is entitled to full faith and credit for purposes of establishing eligibility for TPS. *Garcia-Lopez v. Ashcroft*, 334 F. 3d 840 (9th Cir. 2003); *In re Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005). Therefore, the director's finding will be withdrawn.

However, the state court's expungement of the conviction under section 1203.4 PC does not eliminate the immigration consequences of the applicant's conviction. Under the statutory definition of "conviction" 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 reduce, expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. See *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. See also *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes). In *Matter of Pickering*, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. See *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003).

In the instant case, the applicant does not claim any defect in the underlying criminal proceedings. Therefore, the applicant remains convicted of the misdemeanor offense of inflicting corporal injury upon a spouse or cohabitant for immigration purposes.

The most commonly accepted definition of a crime involving moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *Jordan v. De George*, 341 U.S. 223, reh'g denied, 341 U.S. 956 (1951). The crime of inflicting corporal injury on a spouse involves moral turpitude. *Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993); *Matter of Phong Nguyen Tran*, 21 I&N Dec. 291 (BIA 1996).

The AAO has reviewed the statute under which the applicant was convicted, and notes that the maximum punishment for inflicting corporal injury upon spouse/cohabitant is imprisonment in the state prison up to four years. However, the issue of inadmissibility was not addressed by the director in his decision.

The case will, therefore, be remanded so the director may issue a new decision that addresses the inadmissibility issue under section 212(a)(2)(A)(i)(I) of the Act.

**ORDER:** The case is remanded to the director for further action consistent with the above and entry of a decision.