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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

[Redacted]

M₁

Date: Office: VERMONT SERVICE CENTER

File: [Redacted]

JUN 28 2011

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center. It is now on appeal before the Chief, Administrative Appeals Office (AAO). 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 denied the application on the ground that the applicant had been convicted of two or more misdemeanors committed in the United States.

On appeal, counsel contends that the applicant has been convicted of just one misdemeanor and that his other conviction was only an infraction under California state law.

An alien shall not be eligible for temporary protected status under this section if the Secretary of Homeland Security (Secretary) 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.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” as follows:

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.

The record shows that the applicant was convicted of two motor vehicle violations in California, pleading *nolo contendere* in both cases. The first conviction was on August 27, 1999, under section 23103 of the Vehicle Code (VC 23103), for reckless driving, which is punishable by up to 90 days imprisonment in a county jail. The second conviction was on March 21, 2001, under VC 14601.1(a), for driving while his license was suspended, which is punishable by up to six months imprisonment in a county jail.¹ Thus, both convictions fit the definition of a misdemeanor under 8 C.F.R. § 244.1. They also constituted misdemeanors under California law, which defines this category of crime as punishable by imprisonment in a county jail for up to one year.

With regard to the second conviction, however, the court subsequently reduced the offense to an infraction. On November 18, 2008, the court allowed the complaint to be amended to allege an infraction under VC 14601.1(a), *nunc pro tunc* from March 21, 2001, to which the defendant pleaded no contest. Under California law infractions are not punishable by any jail time.

In his denial decision the director noted the reduction of the second conviction to an infraction, but held that the initial conviction was controlling for immigration purposes. Accordingly, the director concluded that the applicant had been convicted of two misdemeanors and was therefore ineligible for TPS.

On appeal, counsel does not dispute the director's finding that the reckless driving conviction under VC 23103 constitutes a misdemeanor, both under California law and under 8 C.F.R. § 244.1. However, she contends that the director should have recognized the California court's amendment of the second conviction under VC 14601.1(a) to an infraction under California law, *nunc pro tunc*, as valid for immigration purposes. Since infractions in California are not punishable by imprisonment, and thus are not misdemeanors under 8 C.F.R. § 244.1, counsel asserts that the applicant has only been convicted of one misdemeanor, thereby making him eligible for TPS.

Counsel cites California Penal Code section 17(d)(2), which provides that:

A violation of any code section listed in Section 19.8 is an infraction subject to the procedures described in Sections 19.6 and 19.7 when: The court, with the consent of the defendant, determines the offense is an infraction in which event the case shall proceed as if the defendant had been arraigned on an infraction complaint.

Penal Code section 19.8, counsel notes, specifically lists VC 14601.1 as a violation which may be prosecuted as an infraction. Counsel cites federal case law holding that a state court's designation of a criminal offense is binding on the Board of Immigration Appeals (BIA) in determining whether there has been a conviction for immigration purposes. She also cites a BIA decision giving full faith and credit to a California trial court's reduction of an alien defendant's criminal sentence, *nunc pro tunc*, even though it was for the transparent purpose of reducing his offense from a felony to a misdemeanor and enhancing his prospects of avoiding deportation.

¹ The applicant did not serve any jail time for either offense. He was sentenced to 18 months probation for the first conviction and 12 months probation for the second.

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

The linchpin of the applicant's appeal is the BIA's decision *In Re Oscar Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005). That case involved an illegal alien who was convicted by a California court in 2001 of receiving stolen property and sentenced to 365 days of probationary detention in county jail. On the basis of that conviction the legacy Immigration and Naturalization Service (INS) initiated removal proceedings, charging [REDACTED] with deportability under section 237(a)(2)(A)(iii) of the Act as an "aggravated felon" within the definition of section 101(a)(43)(G) of the Act.² To forestall these deportation proceedings counsel filed a motion with the California court to reduce [REDACTED] sentence to something less than 365 days for the express purpose of modifying the "aggravated felony" conviction and facilitating [REDACTED] attempt to obtain a waiver of deportation from INS. The court accommodated [REDACTED] motion by reducing his sentence (of probationary detention) from 365 to 240 days, *nunc pro tunc* to the date of the original conviction. [REDACTED] thereupon filed a motion with INS to terminate deportation proceedings because he no longer stood convicted of an "aggravated felony" under section 101(a)(43)(G) of the Act. Overruling an Immigration Judge, who denied [REDACTED] motion, the BIA gave full faith and credit to the court's modification of the sentence and terminated the removal proceedings.

The BIA distinguished its decision in *Cota-Vargas* from *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). In that case the BIA held that a criminal conviction vacated for the purpose of rehabilitation or immigration hardships, rather than substantive or procedural defects in the underlying decision, would continue to operate as a conviction for immigration purposes under section 101(a)(48)(A) of the Act. Unlike in *Pickering*, [REDACTED] conviction was not vacated. By reducing his sentence to 240 days, however, the court modified [REDACTED] criminal conviction, under both federal and state law, from an aggravated felony to a misdemeanor. The effect of the lesser conviction was to relieve [REDACTED] from the statutory mandate of deportation.

The instant case is different in important respects from *Cota-Vargas*. For example, in *Cota-Vargas* the court's ruling reduced the alien's sentence, which had the consequential result of modifying the criminal conviction from felony to misdemeanor. The opposite applies in this case, since the court ruling modified the applicant's second conviction, with the consequential result of reducing his sentence. The applicant's second conviction in 2001 (like the first in 1999) was initially a misdemeanor offense. When the conviction under VC 14601.1(a) was modified to an infraction in 2008, *nunc pro tunc* to 2001, it effectively ceased to be a criminal conviction because it was not punishable by any imprisonment. The maximum penalty for this infraction under California law is a \$250 fine (Penal Code section 19.8). Since an offense that is not punishable by any imprisonment does not fit the definition of either a felony or a misdemeanor under 8 C.F.R. § 244.1, the practical effect of the court's modification of the applicant's misdemeanor conviction to an infraction was to vacate his second conviction.

This conclusion is bolstered by another BIA decision cited by counsel on appeal – *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004) – which stands for the proposition that a conviction resulting from

² "The term 'aggravated felony' means a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G).

proceedings that lack constitutional protections cannot be considered a conviction, within the meaning of section 101(a)(48)(A) of the Act, for immigrations purposes. Section 19.6 of the California Penal Code (akin to the Oregon statute at issue in *Eslamizar*) provides that persons charged with infractions are not entitled to a jury trial or to have public defenders in their proceedings – both of which are Constitutional rights for persons accused of crimes. Counsel concludes, therefore, that prosecutions for infractions in California cannot be considered “criminal proceedings” and therefore do not yield “convictions” for immigration purposes. For this reason as well, the practical effect of the court’s modification of the applicant’s second misdemeanor conviction to an infraction was to vacate the conviction.

The BIA has long held that no effect is 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, unless such action is taken to remediate substantive or procedural defects in the underlying criminal proceedings. 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*, *supra*, the BIA reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, such as rehabilitation or immigration hardships, the alien remains “convicted” for immigration purposes. See *Pickering*, 23 I&N Dec. 621, 624 (BIA 2003).

In this case, the applicant does not claim any defect in the underlying criminal proceedings. Therefore, the applicant remains "convicted" of the two misdemeanor offenses cited above for immigration purposes

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 that burden.

ORDER: The appeal is dismissed.