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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: NOV 03 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,

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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 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 at least two misdemeanors in the United States.

On appeal, counsel asserts that the director erred and abused his "discretion by considering his driving record sufficiently serious to consider it as a whole to amount to a misdemeanor conviction." Counsel contends that the offense of driving without a license – 2nd offense is an infraction and that the applicant is filing a motion to reopen before the Denver County Court for the assault charge.

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).

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).

"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 Federal Bureau of Investigation report dated March 11, 2010, reflects the applicant's criminal history in the state of Colorado as follows:

1. On August 6, 2004, the applicant was arrested by the Sheriff's Office of Arapahoe County for driving under restraint.
2. On October 1, 2007, the applicant was arrested by the Sheriff's Office of Arapahoe County for failure to appear for a misdemeanor traffic offense.
3. On December 21, 2009, the applicant was arrested by the Denver Police Department for property damage and assault - domestic violence.

On November 9, 2010, a notice was issued, which requested the applicant to submit certified judgment and conviction documents from the courts for all arrests. The applicant, in response, submitted:

- Court documentation in Case no. [REDACTED] from the County Court of Denver, which indicates that on January 2, 2010, the applicant pled guilty to assault, a misdemeanor. The applicant was placed on supervised probation for one year and was ordered to pay a fine. The remaining offense was dismissed.
- Court documentation in Case no. [REDACTED] from the Arapahoe County Court, which indicates that on December 19, 2007, the applicant pled guilty to driving without a license – 2nd offense, a violation of CRS 42-2-101(11), a Class 2 misdemeanor. The applicant was ordered to pay a fine.
- Court documentation in Case no. [REDACTED] from the Arapahoe County Clerk, which indicates that on August 6, 2004, the applicant pled guilty to violating CRS 42-2-138(1)(a), driving under restraint, a misdemeanor. The applicant was sentenced to serve five days in jail and was ordered to pay a fine.

Counsel has not provided any credible evidence to support his assertion that the applicant's second offense of driving without a license resulted in an infraction conviction. The assertion of counsel does not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The fact that this is the applicant's second offense indicates that the applicant had previously been convicted of driving without a license. However, no court documentation was provided for this offense.

Regarding the assault conviction, counsel asserts that the applicant "was offered a plea deal which he accepted without counsel, and without considering the ramifications to this TPS status." Counsel asserts that the applicant has filed a Motion to Reopen before the Denver County Court.

Without credible evidence from the court indicating that the conviction has been vacated for underlying procedural defects having to do with the merits of the case, the conviction continues to effect immigration consequences. *See Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006).¹

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, 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. Section 101(a)(48)(A) of the Act.

The court dispositions reflect that the applicant pled guilty to the offenses and the judge ordered some form of punishment and a restraint on the applicant's liberty to each charge above. As

¹ 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.

cited above, for immigration purposes, a misdemeanor is any offense that is punishable by imprisonment for a term of one year or less, *regardless of the term such alien actually served, if any*. Therefore, the applicant has been "convicted" of the offenses for immigration purposes.

The applicant is ineligible for TPS due to his three misdemeanor convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). There is no waiver available, even for humanitarian reasons, of the requirements stated above. Consequently, the director's decision to withdraw TPS will be affirmed.

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 this burden.

ORDER: The appeal is dismissed.