

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]

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DATE: **DEC 03 2012** Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

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

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.

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded for consideration and action.

The applicant is a citizen of El Salvador who is applying for Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The record reveals that the applicant filed a TPS application, on August 5, 2002, which was subsequently approved. The director withdrew TPS on May 12, 2011, after determining that the applicant had been convicted of a felony and was ineligible for TPS.

On appeal, counsel asserts that the applicant's conviction has been vacated and that the applicant is eligible for TPS. Counsel submits a brief and additional evidence.

The director may withdraw the status of an alien granted Temporary Protected Status 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).

The AAO has reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.<sup>1</sup>

The issue in this proceeding is whether the applicant's conviction has been vacated for immigration purposes, and he is eligible for TPS.

Section 244(c)(2)(B)(i) of the Act provides that an alien shall not be eligible for temporary protected if the Attorney General finds that the alien has been convicted of any felony or 2 or more misdemeanors committed in the United States.

Under section 101(a)(48) of the Act:

(A) 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.

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<sup>1</sup>The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part

Under the current statutory definition of “conviction” as set forth in section 101(a)(48)(A) of the Act, no effect is to be 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 by operation of a state rehabilitative statute. *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, does not expunge a conviction for immigration purposes. *See id.* at 523, 528; *see also Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (reiterating that if a conviction is vacated for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains “convicted” for immigration purposes).

The record reflects that on March 18, 2010, in [REDACTED] Maryland, the applicant plead “not guilty” to Theft, \$10,000 to under \$100,000, a felony, in the State of Maryland, CJIS Code 1-0623, a category of Theft punishable by a maximum jail sentence of 15 years. The judge found him guilty and rendered a probation before judgment sentence of 18 months in jail and suspended all 18 months, but sentenced the applicant to one year probation. On October 27, 2010, the applicant filed a Motion for Reconsideration. The judge conducted a hearing, then terminated probation, struck the guilty verdict, and entered a decision granting probation before judgment.

After careful review of the evidence, we find that the applicant’s date-stamped copy of his motion to vacate filed with the criminal court, together with the other criminal records in the record, establish that the vacatur of his criminal conviction was based on procedural or substantive defects in the original plea, such that it is not a conviction for immigration purposes. It is noted that the transcript of the proceedings indicate that there was no evidence that the applicant ever stole equipment; he was never aware that the equipment had been stolen; and, that he had paid someone for the equipment thinking that he had paid for the Bobcat.

The applicant, therefore, no longer has a felony conviction, and he is now not ineligible for TPS because of a criminal conviction under section 244(c)(2)(B)(i) of the Act.

Therefore, the matter is remanded to the director to examine the record to determine whether the applicant is eligible for TPS, and to issue a new decision. If that decision is adverse to the applicant, it will be certified for review to the AAO pursuant to 8 C.F.R. § 103.4.

As always, the burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The matter is remanded to the Vermont Service Center director for further proceedings consistent with the above and for a new decision.