

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



M1

DATE: FEB 10 2012

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.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 sustained.

The applicant is a native and citizen of El Salvador who was granted 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 failed to submit requested court documentation relating to his criminal record.

On appeal, counsel submits the requested court documents.

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 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 Federal Bureau of Investigation report dated April 2, 2010, reflects the following offenses in the state of Georgia:

1. On June 1, 2004, the applicant was arrested by the Fulton County Police Department for battery, simple battery-family violence and simple battery.
2. On March 15, 2010, the applicant was arrested by the Sandy Springs Police Department for battery-family offense (1st offense).

On December 17, 2010, a notice was issued requesting the applicant to submit certified judgment and conviction documents from the courts for all arrests. The applicant, in response, submitted a

notarized affidavit titled 'motion to reconsider.' The applicant indicated he was informed "that if my record were legally expunged then I did not have to provide or submit this information to your offices, since nothing would appear in my record after they had been permanently expunged." The applicant indicated that he was submitting: 1) the certified court disposition which shows that the case had been dismissed on May 14, 2010; and 2) evidence of completion of counseling sessions for substance abuse and family violence.

Because the applicant's response was titled 'motion to reconsider' it appears to have been rejected by USCIS and returned to the applicant.

On appeal, counsel re-submits the documents, which include:

- A Warrant Master Record and a letter dated February 11, 2011, from the warrant officer/deputy clerk of the Magistrate Court of Fulton County, who indicates that the charge of battery by the Sandy Springs Police Department on March 15, 2010 was dismissed on motion of prosecution on May 14, 2010. Warrant [REDACTED]
- Certified court documentation in Case no. [REDACTED] from the Fulton County State Court, which indicates that the applicant was charged with family violence battery and simple battery. On December 22, 2004, it was ordered that the case be placed on the dead docket of the court as the defendant has completed 24 weeks of domestic violence counseling.

The statutory authority for a criminal dead docket is contained in O.C.G.A. 15-6-61(a)(4)(B), which provides it is the duty of the clerk of the court to keep:

[a] criminal docket which shall contain a summary record of all criminal indictments in which true bills are rendered and all criminal accusations filed in the office of the clerk. . . . The criminal docket shall contain . . . entries of cases which are ordered dead docketed at the discretion of the presiding judge and which shall be called only at the judge's pleasure. When a case is thus dead docketed, all witnesses who may have been subpoenaed therein shall be released from further attendance until resubpoenaed.

A dead docket is characterized as a procedural device by which "the prosecution is postponed indefinitely but may be reinstated any time at the pleasure of the court." *Newman v. State*, 121 Ga. App. 692, 175 S.E. 2d 144 (1970).¹

¹ Placing a case upon the dead docket certainly constitutes neither a dismissal nor a termination of the prosecution in the accused's favor. A case is still pending which can be called for trial at the judge's pleasure, or upon which the accused can make a demand for trial. *Courtenay v. Randolph*, 125 Ga. App. 581, 583 (188 SE2d 396) (1972); *McCord v. Jones*, 168 Ga. App. 891, 892-893 (311 SE2d 209) (1983).

The applicant has presented the requested court documents from the courts and there is no evidence to indicate that the Case in [REDACTED] was removed from the dead docket and the proceedings were reinstated. As there is no record of conviction, the applicant cannot be considered convicted of the misdemeanor offense for immigration purposes. There are no other known grounds of ineligibility; therefore, the director's decision to withdraw the applicant's TPS will, itself, be withdrawn.

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 met this burden.

ORDER: The appeal is sustained.