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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

M1



DATE: Office: VERMONT SERVICE CENTER

FILE:

JAN 12 2012

IN RE: Applicant:

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

ON BEHALF OF APPLICANT: Self-represented

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 initial application was denied by the Director, Vermont Service Center. A subsequent re-registration application was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The record reflects that the applicant filed his initial TPS application [REDACTED] on January 8, 2008. On November 20, 2008, the director denied the application because the applicant failed to: 1) establish his identity; 2) establish he had continuously resided in the United States since February 13, 2001; 3) establish that he had been continuously physically present in the United States since March 9, 2001; and 4) submit requested court documentation relating to his criminal record. No appeal was filed from the denial of that application.

The applicant filed the current TPS application, on January 3, 2011, and indicated that he was re-registering for TPS.

On February 8, 2011, the director denied the re-registration application because the applicant's initial TPS application had been denied and the applicant was not eligible to apply for re-registration for TPS.

On appeal, the applicant asserts that the director "committed a mistake to appreciate/give weight to supporting documents which establishes his TPS eligibility." The applicant provides copies of documents that were previously submitted in response to the denial of his Form I-765, Application for Employment Authorization.

The record reflects that on April 28, 2009, the director denied the applicant's Form I-765 [REDACTED]. On motion, the applicant submitted evidence to establish his identity (El Salvadoran passport, birth certificate with English translation and driver's licenses and identification cards from the state of California), evidence in an attempt to establish continuous residence and continuous physical presence in the United States during the requisite periods, and court documentation (Case no. [REDACTED]) from the Los Angeles County Superior Court of California. The director, in dismissing the motion, on March 4, 2010, determined that the motion did not establish that the denial of the Form I-765 was in error and that no evidence was submitted to establish a pending or approved TPS application.

If the applicant is filing an application as a re-registration, a previous grant of TPS must have been afforded the applicant, as only those individuals who are granted TPS must register annually. In addition, the applicant must continue to maintain the conditions of eligibility. 8 C.F.R. § 244.17.

In this case, the applicant is not a current TPS registrant. Therefore, he was not eligible to re-register for TPS. Consequently, the director's decision to deny the application will be affirmed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* 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).

"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 court documentation in Case no. [REDACTED] from the Los Angeles County Superior Court indicates that on October 25, 2004, the applicant pled *nolo contendere* to violating section 23152(b) VC, driving with .08 percent or more alcohol in the blood, and section 14601.1(a) VC, driving while license is suspended for other reasons, both misdemeanors. The applicant was sentenced to serve time in jail, ordered to pay a fine and attend a first offender alcohol program and was placed on probation for three years. On April 24, 2009, the convictions were expunged pursuant to section 1203.4 PC.

The U.S. Court of Appeals for the Ninth Circuit, the jurisdiction in which this case arises, has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute. Section 1203.4 PC is a state rehabilitative statute. The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty or *nolo contendere* and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings.

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*, a more recent precedent decision, 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 this case, there is no evidence in the record to suggest that the applicant’s convictions were expunged because of an underlying procedural defect in the merits of the case. Therefore, the expunged convictions remain valid for immigration purposes.

In addition, in his notice of July 30, 2008, the director requested the applicant to submit the final disposition of **every** charge against him. The applicant, however, did not submit the final disposition for his arrest on October 22, 1996, for assault with a deadly weapon, a violation of section 245(a)(1) PC in Case no. [REDACTED].¹

The applicant is ineligible for TPS due to his two misdemeanor convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). The applicant is also ineligible for TPS because of his failure to provide the court disposition for his arrest on October 22, 1996, necessary for the adjudication of the TPS application. 8 C.F.R. § 244.9(a).

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

¹ During his removal proceedings, the applicant submitted a California Department of Justice fingerprint report dated August 24, 2010, which revealed this arrest.