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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

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**U.S. Citizenship
and Immigration
Services**



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DATE: **JAN 25 2012**

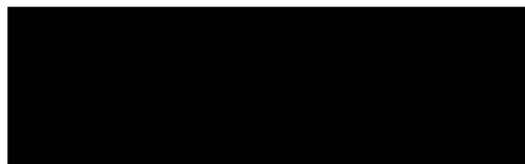
Office: VERMONT SERVICE CENTER

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.

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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 (AAO) on appeal. The appeal will be dismissed.

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 TPS because the applicant had been convicted of two misdemeanors in the United States.

On appeal, counsel asserts that the applicant's conviction for trespass should not be considered a misdemeanor for TPS purposes because the conviction record does not indicate under which subsection he was convicted. Counsel asserts that the general sentencing provision under California Penal Code, section 19 "should not lead to a different conclusion since it creates an assumption as to what the sentence for the offense is."

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.

In response to a notice dated January 13, 2011, which requested the applicant to submit certified judgment and conviction documents from the courts for all arrests, the applicant provided:

- Court documentation in Case no. 7VY01135 from the Superior Court of Los Angeles County, California, which indicates that on March 15, 2007, the applicant was charged with violating sections 23152(a) VC and 23152(b) VC. On

April 4, 2007, the applicant pled *nolo contendere* to violating section 23152(b) VC, driving with .08 percent or more alcohol in the blood, a misdemeanor. The remaining charge was dismissed.

- Court documentation in Case no. [REDACTED] from the Superior Court of Los Angeles County, California, which indicates that on February 7, 2010, the applicant was charged with violating Penal Code section 273.5(a). On March 9, 2010, the court amended the complaint to add a violation of Penal Code section 602.5, trespass, a misdemeanor. The applicant pled *nolo contendere* to violating Penal Code section 602.5. Imposition of sentence was suspended and the applicant was placed on probation for three years, and ordered to pay a fine and court cost. The remaining charge was dismissed.

California Penal Code section 602.5 states:

(a) Every person other than a public officer or employee acting within the course and scope of his or her employment in performance of a duty imposed by law, who enters or remains in any noncommercial dwelling house, apartment, or other residential place without consent of the owner, his or her agent, or the person in lawful possession thereof, is guilty of a misdemeanor.

(b) Every person other than a public officer or an employee acting within the course and scope of his employment in performance of a duty imposed by law, who, without the consent of the owner, his or her agent, or the person in lawful possession thereof, enters or remains in any noncommercial dwelling house, apartment, or other residential place while a resident, or another person authorized to be in the dwelling, is present at any time during the course of the incident is guilty of aggravated trespass punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment.

California Penal Code section 19 states that except in cases where a different punishment is prescribed by any law of the state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both.

Counsel, on appeal, provides an unpublished decision which the AAO determined that New York traffic infractions were not considered disqualifying misdemeanors for immigration purposes. Counsel has furnished no evidence to establish that the facts of the instant application are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

On appeal, counsel asserts, in pertinent part:

8 C.F.R. § 244.1 describes misdemeanors as crimes punishable by imprisonment for one year or less. If the punishment for a conviction under CA Penal Code § 602.5(a) is for a period of six months or less, such is not the same as a punishment for a period of one year or less because there is a difference of 180 days in punishment between the two offenses.

Counsel's argument does not take into consideration that U.S. Citizenship and Immigration Services regulations define a "misdemeanor" as more than five days but less than a year and a day. 8 C.F.R. § 244.1. Because the applicant was convicted of a crime (trespass) for which he could have received a jail sentence of more than five days, he has, for immigration purposes, been convicted of the misdemeanor.

Counsel states that 8 C.F.R. § 244.4 "does not indicate that the convictions must be sustained at any time after the grant of TPS status. As such, the statute should be read that the two misdemeanor convictions must have occurred within a certain time so a reasonable and fair application of the statute can be applied."

The regulation at 8 C.F.R. § 244.4(a) clearly states that an alien shall not be eligible for TPS under this section if the Secretary finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States. Furthermore, 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. (Emphasis added). 8 C.F.R. § 244.14(a)(1). Thus, counsel's assertion is without merit.

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). Counsel's statements made on appeal have been considered. Nevertheless, 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.