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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: **JAN 30 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. § 1254

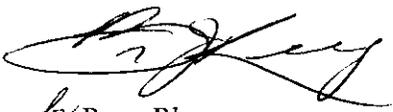
ON BEHALF OF APPLICANT:
[REDACTED]

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,


for 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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 the applicant's TPS because he had failed to submit requested court documentation relating to his criminal record.

On appeal, counsel provides a printout of the applicant's criminal history and a letter from his former defense attorney. Counsel asserts that the court reconsidered the applicant's sentence and disposed of it under the "probation before judgment" statute. Counsel states that the applicant should not be penalized for submitting an expungement record as it had "*always been accept in the past*" each time the applicant reapplied for TPS.

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. Section 244(c)(3)(A) of the Act and 8 C.F.R. § 244.14(a)(1).

An alien shall not be eligible for TPS 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. 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.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC § 802). Section 212(a)(2)(A)(i)(II) of the Act.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record contains a Federal Bureau of Investigation report dated April 28, 1996, which reflects that on February 15, 1994, the applicant was arrested by the Rockville Police Department of Maryland for possession of a controlled substance – cocaine.

The record also reflects that during the applicant's asylum proceedings in 1997, the following documents were presented:

- A Criminal System Inquiry Charge/Disposition Display in Case no. [REDACTED] from the District Court of Maryland, which indicates that on or about February 16, 1994, the applicant was charged with possession with intent to use controlled substance – paraphernalia, and possession of a controlled substance. On March 31, 1994, a *nolle prosequi* was entered for the charge of possession with intent to use controlled substance - paraphernalia. The applicant pled guilty to possession of a controlled substance. The applicant was ordered to pay a fine, serve 90 days in jail (which was suspended) and was placed on probation for one year.
- A letter dated August 20, 1996, from the applicant's defense attorney, [REDACTED] who indicated that on March 30, 1994, the applicant pled guilty to the charge of possession and was given a 90-day suspended sentence with 12 months of supervised probation. [REDACTED] indicated that on June 21, 1994, he filed a Motion to Reconsider Sentence, which was heard on August 22, 1994, and that the judge granted the motion and disposed of the matter under Article 27, section 641 of the Maryland Code.
- A printout of Maryland Code Article 27, section 641 – fulfillment of terms of probation.
- A notice dated July 5, 1994, from the District Court of Maryland for Montgomery County addressed to [REDACTED], which indicated that a Motion to Reconsideration had been filed in Case no. [REDACTED] and that the hearing would be held on August 22, 1994.
- An Order for Expungement Record dated August 18, 1997, which indicated that on August 14, 1997, the applicant was “found to be entitled to expungement of the police records pertaining to the arrest, detention, or confinement of the petitioner on or about on February 16, 1994.”

On February 13, 2009, the director issued a notice requesting the applicant to submit certified judgment and conviction documents from the courts for all arrests. Counsel, in response, submitted:

- A copy of the Order for Expungement Record dated August 18, 1997.
- A Certificate of Compliance (Case no. [REDACTED]), which indicated that the foregoing Order was complied with on November 4, 1997.

On December 20, 2010, the director issued a notice requesting the applicant to submit certified judgment and conviction documents from the courts for all arrests. The applicant was advised that the charge(s) and disposition(s) must be specifically identified. Counsel, in response, submitted an Order for Expungement Record (Case no. [REDACTED] from the District Court of Maryland for Montgomery County and a Certificate of Compliance.

Although the Order for Expungement Record indicates that on June 4, 1997, the applicant was "found to be entitled to expungement of the police records pertaining to the arrest, detention, or confinement of the petitioner on or about on February 16, 1994," it was neither signed nor certified by the court. It is noted that the order has a handwritten notation indicating "'denied not eligible until 8/97.'" The Certificate of Compliance indicated that the foregoing Order was complied with on August 25, 1997.

The director determined that the applicant had not submitted the requested judgment and conviction documentation related to the drug charge. The director noted that a rehabilitative expungement remains a conviction for immigration purposes. The director concluded that the evidence submitted did not overcome the grounds for withdrawal. Accordingly, on April 21, 2011, the director withdrew the applicant's TPS.

On appeal, counsel submits:

- A copy of the Criminal System Inquiry Charge/Disposition Display in Case no. [REDACTED] from the District Court of Maryland.
- A copy of the letter dated August 20, 1996, from the applicant's defense attorney, [REDACTED]
- A printout of Maryland Criminal Code section 5-601, possessing or administering controlled dangerous substances, which indicates that the offense is a misdemeanor.

Counsel, on appeal, asserts that on August 22, 1994, the court reconsidered the sentence and disposed of it under the "probation before judgment statute."

Counsel's assertion, however, is not supported by the record. Although an Order for Expungement of Record has been provided, it neither cited the Maryland statute under which the conviction was expunged nor annotated that a probation before judgment had been issued. 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). Additionally, no corroborative evidence has been submitted to support Mr. [REDACTED] letter that on "August 22, 1994", the judge granted the motion and disposed of the matter.

Under the statutory definition of "conviction" at section 101(a)(48)(A) of the Act, 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 conviction was expunged due to a finding of probation before judgment or because of an underlying procedural defect in the merits of the case. Therefore, the misdemeanor conviction remains valid for immigration purposes.

While the applicant's one misdemeanor conviction does not render him *ineligible* for TPS pursuant to section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a), the applicant is *inadmissible* to the United States under section 212(a)(2)(A)(i)(II) of the Act due to his drug conviction. There is no waiver available to an applicant found inadmissible under this section except for a single offense of simple possession of thirty grams or less of marijuana. The applicant does not qualify under this exception.

Counsel asserts that each time the applicant re-registered for TPS, the expungement record he submitted had always been accepted.

If the previous re-registration applications were approved without reviewing all the contents in the record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Just because the service center director had approved the re-registration applications, the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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 from the withdrawal of the TPS application is dismissed.