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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 31 2012**

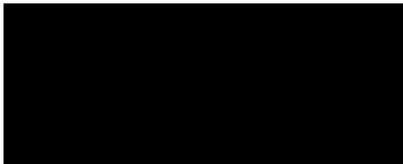
Office: VERMONT SERVICE CENTER

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:

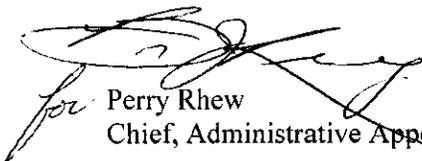


INSTRUCTIONS:

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,

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**DISCUSSION:** The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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

The applicant is a native and citizen of El Salvador who is seeking 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 been convicted of at least two misdemeanors in the United States.

On appeal, counsel for the applicant asserts that the decision is in error as the director failed to consider the applicant's actual criminal history and the correct provision of the Massachusetts General Law. Counsel also asserts that the applicant was not given a 45-days sentence, rather he received a 45-day license suspension and the charge was subsequently dismissed; the arrests in 1995, 1998 and 1999, in which no finding of guilty were made were ultimately dismissed; and there is no record of an arrest on October 16, 2008, on the applicant's Massachusetts criminal history report.

Counsel indicates at Part 2 on the appeal form that a brief and/or additional evidence would be submitted to the AAO within 30 days.<sup>1</sup> However, to date, no further correspondence has been presented by counsel or the applicant. Therefore, the record must be considered complete.

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).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception when the offense is defined by the state as a misdemeanor and the sentence actually imposed is one year or less, regardless of the term actually served. Under this exception, for purposes of 8 C.F.R. § 244 of the Act, the crime shall be treated as a misdemeanor. 8 C.F.R. § 244.1.

"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,

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<sup>1</sup> Every appeal submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions being hereby incorporated into the particular section of the regulations in this chapter requiring its submission. 8 C.F.R. § 103.2(a)(1). The Form I-290B instructs the applicant to submit a brief and additional evidence to the AAO within 30 days of filing the appeal.

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, if adjudication of guilt has been withheld, where 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 the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Any reference to a term of imprisonment of 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. Section 101(a)(48) of the Act.

The record contains the following:

- Court documentation in Case no. [REDACTED] from the Somerville District Court of Massachusetts, which indicates that on August 9, 1995, the applicant was charged with assault and battery by a dangerous weapon, a violation of M.G.L. chapter 265, section 15A.<sup>2</sup> On January 19, 1996, the charge was amended to assault by dangerous weapon - knife, a violation of M.G.L. chapter 265, section 15B, and the applicant admitted to sufficient fact. Sufficient facts were found and the case was continued without finding until January 15, 1997. Sentence was suspended and the applicant was ordered to pay a fine to the victim/witness fund. On July 13, 1998, the case was dismissed at the request of the probation department.
- Court documentation in Case no. [REDACTED] from the Chelsea District Court of Massachusetts, which indicates that on July 12, 1998, the applicant was arrested by the Chelsea Police Department of Massachusetts for destruction of property more than \$250, a violation of M.G. L. chapter 266, section 127. The charge was amended to destruction of property less than \$250. On January 19, 1999, the applicant entered a guilty plea or admission to sufficient facts accepted after colloquy and 278 § 29D warning. Sufficient facts were found and the case was continued without guilty finding until January 18, 2000. The applicant was ordered to pay a fine to the victim/witness fund.
- Court documentation in Case no. [REDACTED] from the Chelsea District Court of Massachusetts, which indicates that on December 19, 1998, the applicant was

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<sup>2</sup> According to M.G.L. chapter 265, section 15B(a), whoever commits assault upon a person sixty years or older, shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.

charged with assault and battery, a violation of M.G.L. chapter 265, section 13A, and threat to commit crime, a violation of M.G.L. chapter 275, section 2. Although, the applicant's pleas were not indicated on the court document, on January 19, 1999, sufficient facts were found and the case was continued without guilty finding until January 18, 2000. The applicant was ordered to pay a fine to the victim/witness fund. On or about February 29, 2000, the case was dismissed without finding.

- Case documentation in Case no. [REDACTED] from Chelsea District Court of Massachusetts, which indicates that on October 16, 2008, the applicant pled guilty to violating M.G.L. chapter 90, section 24(1)(a)(1), operating a motor vehicle under the influence of alcohol - 2<sup>nd</sup> offense. The applicant was sentenced to serve 24 days in jail and was placed on probation for one year.

The Federal Bureau of Investigation report dated February 28, 2011, also reflects the applicant's criminal history in the state of Massachusetts as follows:

1. On June 6, 2004, the applicant was arrested by the Lynn Police Department for operating motor vehicle under the influence of alcohol.
2. On March 28, 2006, the applicant was arrested by the Lynn Police Department for straight warrant.
3. On August 20, 2007, the applicant was arrested by the Boston Police Department for operating a motor vehicle after revocation or suspension.
4. On July 13, 2009, the applicant was arrested by the Boston Police Department for threats and assault by means of a dangerous weapon – knife.

On July 29, 2009, and May 11, 2010, a Notice of Intent to Withdraw TPS was issued, which requested the applicant to submit certified judgment and conviction documents for all arrests. The applicant, in response, submitted:

- Court documentation in Case no. [REDACTED] 8 from the District Court of Southern Essex, which indicates that on June 6, 2004, the applicant entered a guilty plea or admission to sufficient facts accepted after colloquy and 278 § 29D warning to violating M.G.L chapter 90, section 24(j), operate a motor vehicle under influence of alcohol. Sufficient facts were found and the case was continued without guilty finding until December 6, 2005. The applicant was sentenced to serve 45 days in jail. On March 20, 2006, the case was dismissed on recommendation of the probation department.
- Court documentation in Case no. [REDACTED] from the District Court of Southern Essex, which indicates that on June 16, 2006, the charges of witness intimidation and two counts of assault and battery were dismissed. This case relates to number two above.

- Court documentation in Case no. [REDACTED] from the Brighton District Court, which indicates that on September 12, 2007, the applicant entered a guilty plea or admission to sufficient facts accepted after colloquy and 278 § 29D warning to violating M.G.L. chapter 90, section 23(d), operating a motor vehicle while license is suspended. Sufficient facts were found and the case was continued without guilty finding until March 6, 2008. The applicant was ordered to pay court cost. On March 6, 2008, the case was dismissed on recommendation of the probation department. On August 26, 2010, the applicant filed a motion to vacate plea. On September 15, 2010, the motion was granted and the case was dismissed.
- Court documentation in Case no. [REDACTED] from the Boston District Court, which indicates that on October 30, 2009, the charges of threats and assault by means of a dangerous weapon were dismissed. This case relates to number four above.

An admission to "sufficient facts" is deemed to be an admission to facts sufficient to warrant a finding of guilt. *See Luk v. Commonwealth*, 658 N.E.2d 664, 667 n.6 (Mass. 1995) (citing *Commonwealth v. Duquette*, 386 Mass. 834, 438 N.E.2d 334, 337 (1982)).

The applicant's guilty plea or admission to sufficient facts is a conviction within the meaning of section 101(a)(48)(A) of the Act.

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*, 23 I&N Dec. 621 (BIA 2003), the Board of Immigration Appeals (BIA) found that "If a court vacates an alien's conviction for reasons solely related to rehabilitation to immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceeding, the conviction is not eliminated for immigration purposes."

In this case, there is no evidence in the record to suggest that the applicant's conviction in Case no. [REDACTED] was vacated because of an underlying procedural or substantive defect in the trial court proceedings. Therefore, the vacated judgment remains valid for immigration purposes.

The applicant is ineligible for TPS due to his criminal convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). 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.

Finally, while not the basis for the dismissal of the appeal, it is noted that a removal hearing was held on September 21, 2009, and the applicant was ordered removed from the United States. The applicant filed an appeal, which is currently pending before the BIA.

**ORDER:** The appeal is dismissed.