

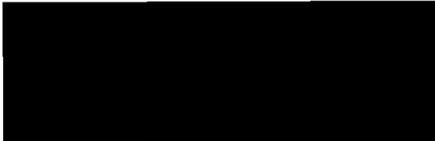
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



M,

DATE: **MAR 02 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DISCUSSION: The applicant's Temporary Protected Status was withdrawn and an application for re-registration was simultaneously denied due to abandonment by the Director, Vermont Service Center.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 submits a brief arguing that the convictions are unconstitutional and patently erroneous. 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.¹ However, more than nine months later, no additional correspondence has been presented by either counsel or the applicant.

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.

¹ 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.

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

The Federal Bureau of Investigation report dated March 27, 2010, reflects the following offenses in the state of Virginia:

1. On January 11, 2009, the applicant was arrested by the [REDACTED] Department for driving while intoxicated.
2. On March 9, 2009, the applicant was arrested by the [REDACTED] Department for two counts of robbery and two counts of burglary.

The record contains court documentation in Case no. [REDACTED] from the [REDACTED] [REDACTED] Court, which indicates that the applicant was charged with violating Virginia Code section [REDACTED], driving while intoxicated with .08 percent or more alcohol in the blood, a Class 1 misdemeanor, committed on January 11, 2009. On March 16, 2009, the applicant was found guilty by the court and was ordered to pay a fine, sentenced to serve 62 days in jail of which 60 days were suspended for a period of one year, and was placed on probation for one year.

The record also contains court documentation in Case no. [REDACTED] from the [REDACTED] [REDACTED] Court, which indicates that the applicant was charged with violating Virginia Code section [REDACTED], no driver's license, a Class 2 Misdemeanor, committed on May 17, 2009. On June 2, 2009, the applicant was found guilty in absentia. The applicant was ordered to pay a fine.

On January 18, 2011, the director issued a notice, which requested the applicant to submit certified judgment and convictions documents from the courts for all arrests, including the arrest on March 9, 2009. The applicant was granted 30 days in which to submit the requested court documents. The applicant, however, failed to respond to the notice. The director determined that the applicant had failed to submit evidence necessary for the proper adjudication of the application and withdrew the applicant's TPS on April 26, 2011.

On appeal, counsel submits the incident report from the [REDACTED] and a printout of the Full Case Information for Case ID [REDACTED], which indicates that on November 4, 2009, in the [REDACTED], the applicant was convicted of violating two Class 1 misdemeanor counts of Virginia Code section [REDACTED], accessory after the fact in felony. The applicant was sentenced to serve six months in jail, ordered to pay a fine and was placed on supervised probation for two years. Case nos. [REDACTED]. The remaining charges, conspiracy-robbery and conspiracy-burglary, were [REDACTED].

On appeal, counsel asserts that the applicant failed to respond to the notice of January 18, 2011, because he was acquiring legal advice regarding the accusations and his convictions. Counsel asserts that the applicant was also "considering legal action as well as filing a complaint with the State Bar for malpractice against the criminal defense attorney." Counsel states that the

convictions should not be used as the basis for the withdrawal of the applicant's TPS "since we believe that he had bad (if not terrible) assistance of counsel" Counsel also states that the applicant's double conviction is unconstitutional because it involves the same conviction duplicated out of one offense.

Counsel's statement on appeal has been considered. The AAO, however, is not the appropriate forum to determine constitutional issues involving the applicant's criminal record. Rather, those issues are within the jurisdiction of the judicial court. Furthermore, the AAO may only look to the judicial records to determine whether the person had been convicted of the crime, and may not look behind the conviction to reach an independent determination concerning guilt or innocence. *Pablo v. INS*, 72 F.3d 110, 113 (9th Cir. 1995); *Gouveia v. INS*, 980 F.2d 814, 817 (1st Cir. 1992); and *Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991).

While the determination of whether the applicant's crimes arose "out of a single scheme of criminal misconduct" may be relevant to an individual's removability under section 237 of the Act, this determination has no bearing on the applicant's eligibility for TPS. The fact that the offenses arose from a common scheme does not preclude them from being counted as separate offenses. *Black's Law Dictionary*, 401 (9th Ed., 2009) defines the term "count" to mean a separate and distinct claim in a complaint or similar pleading. It also indicates that the term "count" is used to signify the part of an indictment charging a distinct offense. According to the court disposition, the applicant was charged with two separate violations to which he pled guilty to two separate crimes. Therefore, the applicant has been convicted of two misdemeanor offenses.

Counsel asserts that the applicant's previous conviction of violating Virginia Code section 46-2, permit unlicensed person to drive, is an infraction. Counsel states, in pertinent part:

Since the Virginia Code does not provide a penalty for lending a car to someone without a driver's license, then the act cannot be crime. We do not understand how a court of justice is convicting people of this crime, specially our client, but we believe that this infraction does not amount to a Misdemeanor since all crimes are required to be clear on what are the action prohibited and the penalty involved.

It appears from counsel's statement, the applicant was convicted by the court of violating Virginia Code section 46-2. As noted above, the notice of January 18, 2011, requested the applicant to submit certified judgment and conviction documents for all arrests. The court disposition for this violation, however, has not been submitted. The burden is on the applicant to provide affirmative evidence of his eligibility.

The applicant is ineligible for TPS because of his failure to provide information necessary for the adjudication of his application. 8 C.F.R. § 244.9(a). Consequently, the director's decision to withdraw TPS will be affirmed.

The applicant is also ineligible for TPS because he has been convicted of two or more misdemeanors. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). There is no waiver available, even for humanitarian reasons, of the requirements stated above.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. 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.