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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 2 6 2013 Office: NEBRASKA 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. § 1254a

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 Nebraska 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant claims to be a native and citizen of Haiti 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 denied the application because the applicant had been convicted of two felonies in the United States.

On appeal, counsel for the applicant asserts that the director did not consider the entire court proceedings as the docket also indicates that a motion for new trial was filed and the case was subsequently dismissed. Counsel submits an additional copy of the court docket

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, 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.

A conviction vacated for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes. *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006).

The record contains court documentation in Case no. which indicates that the applicant was found guilty on September 22, 1999 of assault and battery – domestic, a violation of M.G.L. c 265/13/A, intimidation of a witness, a violation of M.G.L. c 268/13B, and threat to commit crime, a violation of M.G.L. c 275/2. The applicant was placed on supervised probation for two years for violating M.G.L. c 265/13A, M.G.L. c 265/15B and M.G.L. c 268/13B.

The record also contains court documentation in Case no. which indicates that on September 22, 1999, the applicant pled guilty or admission to sufficient fact after colloquy and 278 § 29D warning for violating M.G.L. c 265/15B, assault with a deadly weapon. Sufficient facts were found and the case was continued without guilty finding until September 26, 2000.

On appeal, the applicant submitted an additional copy of the court documentation in Case no. from the Circuit District Court of Quincy, Massachusetts, which indicates that on January 17, 2007, the applicant had filed a motion for new trial; that on February 12, 2007, the judge allowed the motion for new trail in the Plymouth District Court; and that on March 23, 2007, the case was dismissed with prejudice.

On January 30, 2013, the AAO sent a notice to the applicant informing him that the court documentation submitted on appeal was not complete as it was silent as to its reason for the dismissal of the case. The applicant was advised that 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. *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, 624 (BIA 2003), it was 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.

The applicant was granted 30 days in which to submit either certified complete court proceedings or a certified letter from the District Attorney's office outlining the basis for the dismissals of Cases and

Counsel, in a letter dated February 4, 2013, indicates that it was determined by the court "that in 1999 there was a violation of [the applicant's] constitutional and statutory rights." Counsel indicated that as the court case is 14 years old and in storage off site he would like an additional 30 days in which to submit the requested documentation.

Counsel, in a letter dated February 23, 2013, indicates that he contacted the Norfolk County District Attorney's Office, who informed him that "due to the age of [the applicant's] cases, they no longer have any case materials, and in any event do not normally write letters concerning immigration matters." Counsel also indicates that he contacted the Norfolk (Quincy) District Court and was informed that "they keep only the docket sheets and the entire case files are at a remote location and would take quite some time to locate and retrieve."

The applicant has had ample time to submit court documentation that outlined the basis for the dismissal of the above cases. In a notice dated February 24, 2011, the applicant was requested to submit the final disposition (e.g. sentence, probation, dismissal) of every charge against him. The notice advised the applicant that the charge and disposition must be specifically identified.

In response to the AAO's notice, counsel submits a copy of a Motion for New Trial in Case nos. and along with a statement from the applicant's criminal lawyer who filed the motion. Counsel states that "[t]he motion was based on violation of a state statute as interpreted by the Massachusetts Supreme Judicial Court in Com. V. Hilaire, 437 Mass 809 (200) and other cases. I am enclosing copies of the SJC case and statute in question (MGL c. 278, sec. 29D." Counsel asserts that under the case law cited in the AAO's notice of January 30, 2013, the judge's "2007 ruling allowing the motion for new trial was clearly for a violation of state criminal procedural statute and had nothing to do with a 'rehabilitative provision.'"

However, this is conjecture on counsel's part, and this language is not included in the judge's order. Without certified documentation from the court or District Attorney's Office indicating that the convictions have been vacated for underlying procedural defects having to do with the merits of the case, the assertions 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). Accordingly, the convictions continue to effect immigration consequences.

The applicant is ineligible for TPS due to his felony convictions. 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. Consequently, the director's decision to deny the application for this reason 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.