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U.S. Citizenship  
and Immigration  
Services

DATE:

APR 30 2013

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:

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 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**DISCUSSION:** The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 case will be remanded for further consideration and action.

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.

On May 9, 2012, in the [REDACTED] New York, the applicant pleaded guilty to one count of sexual misconduct, a violation of New York PL § 130.20.01,<sup>1</sup> a Class A misdemeanor. The applicant was sentenced to six years probation and a five year order of protection, and was ordered to register as a sex offender.

On June 18, 2012, the director withdrew TPS because he found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act due to his conviction of sexual misconduct.

Section 212(a)(2)(A)(ii) of the Act provides for an exception to inadmissibility of an alien convicted of only one crime of moral turpitude, where the maximum penalty possible for the crime did not exceed imprisonment for one year and the alien was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed). In this case, the applicant was not sentenced to imprisonment rather, he was placed on probation. This conviction **alone** is not sufficient to establish the applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Therefore, the director's finding will be withdrawn.

The record of proceeding currently contains a copy of the indictment dated May 9, 2012, from the [REDACTED] New York, which indicates the age of the victim.

The case will be remanded in order for the director to make a determination whether the applicant's conviction for sexual misconduct constitutes sexual abuse of a minor and is therefore an aggravated felony under section 101(a)(43)(A) of the Act. *See Ganzhi v. Holder*, 624 F.3d 23 (2d Cir. 2010); *Matter of Small*, 23 I&N Dec. 448 (BIA 2002) (finding that sexual abuse in the second degree, in violation of New York PL 130.60(2), a Class A misdemeanor under state law, constitutes an aggravated felony under section 101(a)(43)(A)); and, *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (finding that a crime designated as a misdemeanor under state law, may nevertheless constitute an aggravated felony for purposes of section 101(a)(43)(A) of the Act).

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<sup>1</sup> Under New York PL § 130.20.01, a person is guilty of sexual misconduct when he or she engages in sexual intercourse with another person without such person's consent.

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The director may request any evidence deemed necessary to assist with the determination of the applicant's eligibility for TPS. As always in these proceedings, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The case is remanded for appropriate action and decision consistent with the foregoing.