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U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: FEB 04 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. § 1254a

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.

Thank, you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

for Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal is sustained.

The applicant is a citizen of El Salvador who is applying for Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The record reveals that the applicant filed a TPS application, on July 31, 2001 which was subsequently approved. The director withdrew TPS on November 30, 2011, after determining that the applicant had been convicted of two misdemeanors.

On appeal, counsel contends that the applicant is eligible for TPS because the applicant has provided court documentation that establishes that he had not been convicted of two misdemeanors. Counsel further contends that even if the applicant is deemed to have a misdemeanor conviction, he is still eligible for TPS. Counsel submits additional evidence.

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).

The AAO has reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.¹

Section 244(c)(2)(B)(i) of the Act provides that an alien shall not be eligible for temporary protected if the Attorney General finds that the alien has been convicted of any felony or 2 or more misdemeanors committed in the United States.

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.

The record reflects that the applicant was arrested by the Sheriff's Office, [REDACTED], on December 11, 1993, and he was charged with two violations:- Count I: 459/460.2/461.2 PC COMM. BURG. 2nd DEG; and, Count II: 484-488 PC PETTY THEFT.

The court disposition dated December 14, 1993, from the Municipal Court [REDACTED] reveals that as to Count 1, the applicant plead guilty, and the court found the applicant guilty of a violation of: 459/460.2/461.2 PC COMM.

¹The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

BURG. 2nd DEG, a misdemeanor. Imposition of sentence was suspended and the applicant was placed on probation for three years and ordered to serve 15 days in jail. As to Count II, the court disposition does not support the director's finding. By its own motion the court suspended the petty theft charge; there is no indication in the record that the applicant entered a plea to Count II or admitted to any facts sufficient to warrant a finding of guilty. Therefore, the applicant was not convicted of the misdemeanor petty theft offense within the meaning of section 101(a)(48)(A) of the Act.

The court record also reveals that on February 13, 2004, the Superior Court issued an Order for Relief under Penal Code § 1203.4, § 1203.4a, for the 459/460.2/461.2 PC COMM. BURG. 2nd DEG charge. The court ordered the plea, verdict, and finding set aside, and dismissed the charge pursuant to Penal Code § 1203.4, § 1203.4a.

The state court's dismissal of the conviction under § 1203.4 PC, however, does not eliminate the immigration consequences of the applicant's conviction. Under the statutory definition of "conviction" at section 101(a)(48)(A) of the INA, 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*, 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 the instant case, the applicant does not claim any defect in the underlying criminal proceedings. Therefore, the applicant remains convicted of the misdemeanor offense.

The evidence of record reflects that the applicant has one misdemeanor conviction, and it does not render him ineligible for TPS under the provisions of section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a). There are no other known grounds of ineligibility; therefore, the director's decision to withdraw the applicant's TPS will, itself, be withdrawn.

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 met this burden.

ORDER: The appeal is sustained.