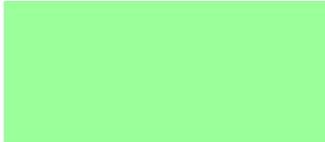




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: FEB 07 2013

Office: VERMONT SERVICE CENTER



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 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

(b)(6)

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**DISCUSSION:** The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion to reopen. The motion 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 TPS because the applicant had failed to submit the requested court documentation relating to his arrest record. The AAO affirmed the director's denial and dismissed the applicant's appeal on December 2, 2011. The AAO noted that the court disposition provided by the applicant reveals that he was convicted of violating Virginia Code section 46.2-852, reckless driving,<sup>1</sup> a Class 1 misdemeanor, on December 11, 2007. We also noted that court documentation dated December 13, 2010, from the domestic violence probation officer of [REDACTED] indicated that on March 8, 2010, the applicant was before the court and was granted a deferred finding for 24 months on the charge of domestic assault and battery; that the applicant was placed on probation with [REDACTED] and ordered to comply with domestic violence treatment; that on July 20, 2010, the applicant successfully completed all the conditions of his supervised probationary period and his case was closed with [REDACTED] that the probation officer indicated that the case will remain open in court until March 8, 2012,<sup>2</sup> at which time, if no new criminal charges have been incurred, the charge will be dismissed by the court. Case no. [REDACTED] that, contrary to counsel's assertion on appeal, the director did not find the applicant was convicted of domestic assault and battery. We noted, in addition, that without the requested court documentation from the [REDACTED] it cannot be determined if the offense of Virginia Code section 18.2-57.2 qualifies as a conviction under section 101(a)(48)(A) of the Act; and that the applicant had the opportunity on appeal to provide the requested court documentation, but failed to do so.

A motion to reopen must state the new facts to be proved at the reopened proceeding, and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

On motion, counsel asserts that the director and the AAO erred in denying TPS. Counsel contends that the applicant cannot be denied TPS because of criminal convictions, as the "traffic offense is neither a misdemeanor nor an aggravated felony, as it can fall under the petty offense exception;" that there was no finding of guilt in the domestic assault and battery charge and therefore, there is no conviction in the matter. Counsel submits a brief and the court dispositions relating to Case nos. [REDACTED]

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<sup>1</sup> The director, in his decision, inadvertently cited the offense to be driving while intoxicated. This was a harmless error by the director, which did not affect the outcome of the decision and has not prejudiced the applicant.

<sup>2</sup> The AAO, in its decision of December 2, 2011, inadvertently noted the date as March 8, 2010.

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).

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. Any reference to a term of imprisonment or 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)(A) and (B) of the Act.

"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 AAO has reviewed counsel's brief on motion and the authorities cited therein, and concludes that the misdemeanor offenses continue to affect immigration consequences.

Counsel citing *De Osorio v. INS*, 10 F. 3d 1034 (4<sup>th</sup> Cir, 1993) asserts that the applicant's traffic offense is neither a misdemeanor nor an aggravated felony. Counsel, however, does not state how the court's holding applies to the instant application.<sup>3</sup> Neither the director nor the AAO determined that the applicant's reckless driving conviction was deemed an aggravated felony.

Contrary to counsel's assertion, a violation of Virginia Code section 46.2-852 is classified as a Class 1 misdemeanor. See Virginia Code section 46.2-868. The maximum penalty for a conviction of a Class 1 misdemeanor is imprisonment for a period of not more than 12 months or by a fine of not more than \$2500 or both such fine and imprisonment. See Virginia Code section 18.2-11. In the instant case, the applicant was sentenced to serve 30 days in jail and was ordered to pay a fine of \$300. As cited above, a misdemeanor is any offense that is 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>3</sup> It was held that the Board's interpretation of the aggravated felony bar applies to convictions predating the enactment of the statutory definition was "reasonable and consistent with congressional intent." *Id.* at 1039. It was also held that the bar to waiver relief applies to all aliens seeking such relief irrespective of whether they are in deportation proceedings or seeking entry into the United States. *Id.*

For the charge of domestic assault and battery, the court disposition submitted with this motion reveals that on March 8, 2010, the applicant pled nolo contendere to a violation of Virginia Code section 18.2-57.2. The court accepted the applicant's plea and he was placed on deferred adjudication to March 8, 2012. The applicant was placed on probation and ordered to comply with domestic violence treatment.

The court documents reflect that the applicant pled guilty to the reckless driving offense and nolo contendere to the domestic assault and battery offense and the judge ordered some form of punishment, penalty or restraint on the applicant's liberty to each charge. Therefore, the applicant has been "convicted" of the misdemeanor offenses for immigration purposes. Section 101(a)(48)(A) of the Act.

The applicant has two misdemeanor convictions and is ineligible for TPS pursuant to section 244(c)(2)(B)(i) of the Act. Consequently, the director's decision to withdraw TPS, and the AAO dismissal of the appeal, will not be disturbed.

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 motion is dismissed. The previous decision of the AAO dated December 2, 2011, is affirmed.