



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE:

JUN 03 2013

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.

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**DISCUSSION:** The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 (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 TPS because the applicant had been convicted of two misdemeanors in the United States and because he had failed to submit requested court documentation relating to his arrest on September 5, 1999.

On appeal, counsel asserts that the applicant has only one misdemeanor conviction for driving while intoxicated.

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).

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).

"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.

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 Federal Bureau of Investigation (FBI) report dated January 17, 2012, reflects the applicant’s criminal history in [REDACTED] North Carolina as follows:

1. On January 2, 1998, the applicant was arrested for driving while impaired. Case no. [REDACTED]
2. On September 5, 1999, the applicant was arrested under the alias [REDACTED] for assault on a female – non-aggressive. Case no. [REDACTED]
3. On November 11, 2011, the applicant was arrested for protective order violation and communicating threats.
4. On December 17, 2011, the applicant was arrested for protective order violation.

In response to the notice of May 22, 2012, which requested the applicant to submit certified judgment and conviction documents from the courts for all arrests, the applicant provided court documentation from the [REDACTED], [REDACTED], North Carolina which indicated:

- On May 19, 1997, the applicant was arrested and subsequently charged with reckless driving to endanger and no operator’s license. On October 30, 1997, the court granted a prayer for judgment for the reckless driving charge, a violation of North Carolina Gen. Statute § 20-140, a Class 2 misdemeanor. The applicant was ordered to pay a fine. The remaining charge was dismissed. Case no. [REDACTED]
- On January 2, 1998, the applicant was arrested and subsequently charged with driving while intoxicated, a violation of North Carolina Gen. Statute § 20-1381(a), a misdemeanor. On April 16, 1998, the applicant pled guilty to this offense. The applicant was sentenced to serve 24 months in jail, ordered to pay a fine/court cost and complete a 28-day program and was placed on probation for 18 months. Case no. [REDACTED]
- For number three above, the protective order violations were dismissed on April 18, 2012. Case nos. [REDACTED] and [REDACTED]
- For number four above, the protective order violation was dismissed on April 25, 2012. Case no. [REDACTED]

The director, in his decision of July 6, 2012, indicated that the applicant had been convicted of reckless driving on April 16, 1998. A review of the court documentation does not support the director’s findings. The court documentation indicates that the applicant pled guilty to driving while impaired. This was a harmless error by the director, which did not affect the outcome of his decision and did not prejudice the applicant. The record still reflected two misdemeanor convictions that rendered the applicant ineligible for TPS.

Regarding number one above, counsel, on appeal, asserts, “[w]e can only find one charge for that date, filed on December 18, 1997, which was listed as a Traffic Violation and later dismissed.” Counsel provides court documentation to support his assertion.

The AAO concludes that the court documentation provided by counsel on appeal does not relate to the applicant’s arrest on January 2 1998 as the: 1) violation of driving while impaired occurred on December 18, 1997; 2) final disposition was entered on June 1, 2000; and 3) case number is [REDACTED]. No evidence has been submitted indicating that case nos. [REDACTED] and [REDACTED] are one and the same.

Claiming a defect in the criminal proceedings, counsel asserts that the applicant’s plea on October 30, 1997, was reduced, by Motion for Appropriate Relief, to a plea of improper equipment, which is a non-moving violation.

Counsel provides copies of the applicant’s Motion for Appropriate Relief and the Order from the [REDACTED], North Carolina. The Order indicates that on September 13, 2012, the court concluded that good cause had been shown and granted the applicant’s Motion for Appropriate Relief. The entry of judgment was set aside, the matter was reopened for disposition, and the court accepted the applicant’s plea to improper equipment.

The AAO concludes that the applicant’s October 30, 1997 conviction has been vacated for underlying procedural or constitutional defect having to do with the merits of the case.

Regarding the applicant’s arrest on September 5, 1999, counsel states that the applicant does not acknowledge this charge. Counsel states, “[the applicant] tells me in Texas it was mentioned to [the applicant] once that someone was using his name, and that may have created confusion. He tells me he does not even know where to look, because he does not have an information about it”

This statement is not persuasive as the applicant’s arrest report was obtained via a fingerprint analysis from the FBI records. Further, the director, in the notice of May 22, 2012, outlined the date (September 5, 1999) and place ([REDACTED] North Carolina) of arrest. The applicant has the burden to establish, with affirmative evidence, that the arrest was dismissed or in error. A statement from counsel is not affirmative evidence and fails to meet the applicant’s burden. 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.

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.