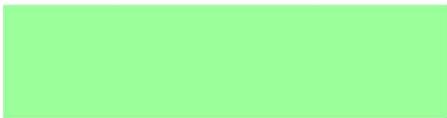




U.S. Citizenship  
and Immigration  
Services

(b)(6)



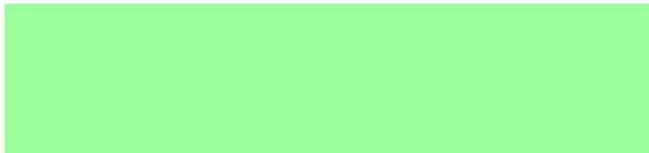
DATE: JUN 28 2013 Office: VERMONT SERVICE CENTER

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 application was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The case will be remanded for further action and consideration.

The applicant claims to be a native and citizen of El Salvador 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 a felony in the United States.

On appeal, counsel asserts that the applicant's felony conviction was reduced to a misdemeanor under Penal Code section 17(b) and subsequently dismissed pursuant to Penal Code section 1203.4.

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.

The record contains court documentation in [REDACTED] from the [REDACTED] Superior Court of California, which indicated that on January 31, 1995, the applicant was charged with violating section 20001(a) VC, hit and run causing injury or death, and section 12500(a) VC, driving without a license. On March 1 1995, the applicant was convicted of violating section 20001(a) VC, a felony. On April 19, 1995, imposition of sentence was

suspended for 36 months and the applicant was placed on formal probation for 36 months, the applicant was sentenced to serve 240 days in jail and ordered to pay a fine. The remaining charge was dismissed. On September 30, 2005, the court ordered the felony conviction be reclassified as a misdemeanor pursuant to section 17(b) PC, the applicant's plea was set aside and the conviction was expunged pursuant to section 1203.4(a) PC.

The issue in this proceeding is whether the court's subsequent expungement and reclassification of the applicant's felony conviction as a misdemeanor offense is valid for immigration purposes.

Section 17(b) PC does not serve to dismiss or otherwise vacate a conviction subsequent to the completion of a term of probation. This section defines the range of punishments for both felony and misdemeanor offenses, when the trial court may exercise its discretion in determining the punishment to be imposed under a "wobbler" statute.

Because the reclassification was done pursuant to section 17(b) PC, the court's decision is entitled to full faith and credit for purposes of establishing eligibility for TPS. *Garcia-Lopez v. Ashcroft*, 334 F. 3d 840 (9th Cir. 2003); *Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005). Therefore, the director's finding that the remains convicted of a felony will be withdrawn.

However, the state court's expungement of the conviction under section 1203.4 PC 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 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. 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*, 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.

In the instant case, the applicant does not claim any defect in the underlying criminal proceedings. Therefore, the applicant will remain convicted of the misdemeanor offense for immigration purposes.

The applicant has one misdemeanor conviction for violating section 20001 VC 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 regulation in 8 C.F.R. § 244.4(a). Therefore, the director's decision to deny the TPS application will be withdrawn.

The record, however, reflects that the validity period of the applicant's fingerprint check has expired. Accordingly, the case will be returned for the purpose of sending the applicant a fingerprint notification form, and affording him the opportunity to comply with its requirements. Following completion of this requirement, the director will render a new decision. Should the decision be adverse, the director must give written notice setting forth the specific reasons for the denial pursuant to 8 C.F.R. § 103.3(a)(1)(i), and the applicant shall be permitted to file an appeal without fee.

**ORDER:** The case is remanded to the director for further action consistent with the above and entry of a decision.