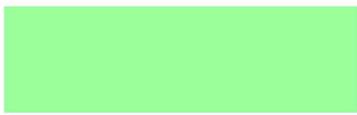


(b)(6)

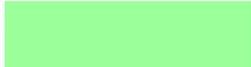
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

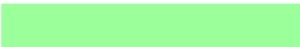


U.S. Citizenship  
and Immigration  
Services



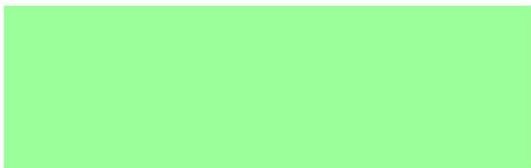
DATE: **MAR 04 2013** Office: VERMONT SERVICE CENTER

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. 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,

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

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 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.

On appeal, counsel citing *Retuta.v. Holder*, 591 F.3d 1181 (9<sup>th</sup> Cir. 2010) asserts that the government has the burden, in a removal proceeding, of proving by clear, unequivocal, and convincing evidence that the applicant is removable. Counsel contends that the director has not produced any documents showing that the applicant has been convicted of the crimes that are being used against him to deny the granting of TPS.

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.

In response to the notice issued on April 24, 2012, which requested the applicant to provide certified judgment and conviction documents from the courts for all arrests, the applicant submitted:

1. Court documentation in Case [REDACTED] from the Superior Court of Los Angeles County, California, which indicates that on June 8, 2010, the applicant

was charged with violating count one, section 647(b) PC and count 2; section 653.22(a) PC, both misdemeanors. On July 2, 2010, the court ordered the complaint amended to add a violation of section 602(k) PC, trespassing, a misdemeanor, as count 3, and the applicant pled *nolo contendere* to count 3. The court document indicates, in pertinent part, "The people's motion to amend the complaint by interlineation to add count 3, penal code section 602(k), a misdemeanor, is granted." The applicant was ordered to pay a fine and court costs and was placed on summary probation for 12 months. The remaining charges were dismissed. On October 18, 2010, the conviction was expunged in accordance with section 1203.4 PC.

2. Court documentation in Case no. [REDACTED] from the Superior Court of Los Angeles County, California, which indicates that on February 25, 2011, the applicant was charged with violating sections 23152(a) VC and 23152(b) VC, both misdemeanors. On March 3, 2011, the applicant pled *nolo contendere* to violating section 23152(b) VC, driving with .08 percent or more alcohol in the blood. The applicant was placed on summary probation for 36 months, ordered to attend an alcohol program and pay court costs and pay a fine or serve 13 days in the county jail. The remaining charge was dismissed.

In determining whether the applicant is eligible for TPS, we look to section 244(c)(2)(B)(i) of the Act, not to section 237 of the Act as TPS proceedings are separate and distinct from removal proceedings.

The U.S. Court of Appeals for the Ninth Circuit, the jurisdiction in which this case arises, has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute. Section 1203.4 PC is a state rehabilitative statute. The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty or *nolo contendere* and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings.

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), the Board 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.

There is no evidence in the record to suggest that the trespassing conviction was overturned on account of an underlying procedural or constitutional defect in the merits of the case. Therefore, despite the expungement of the conviction, the offense remains a valid conviction for immigration purposes.

In the instant case, the court documentation submitted reflects that the applicant pled *nolo contendere* to each offense, and the judge ordered some form of punishment and/or penalty to the charges above. Therefore, for immigration purposes, the applicant has been convicted of misdemeanor offenses within the meaning of section 101(a)(48)(A) of the Act.

The AAO has reviewed counsel's brief on appeal and the authority cited therein, and concludes that the convictions continue to effect immigration consequences, and thus render the applicant ineligible for TPS. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(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.