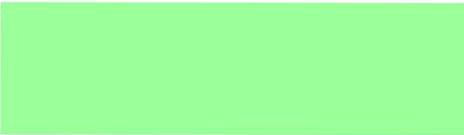




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: Office: VERMONT SERVICE CENTER

**MAR 26 2013**

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,

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**DISCUSSION:** The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center.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 asserts that the applicant's conviction of driving under the influence on November 17, 2010 was vacated and set aside on constitutional grounds. Counsel states that the former charge of driving under the influence was changed to reckless driving, which is a traffic offense and not a misdemeanor within the meaning of 8 C.F.R. § 244.4. Counsel states that the applicant has one misdemeanor conviction entered on October 19, 2010.

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.

The Federal Bureau of Investigation report dated December 17, 2011, reflects the applicant's criminal history in the state of Georgia as follows:

1. On August 22, 2010, the applicant was arrested by the Brunswick State Patrol for driving under the influence, a violation of Georgia Code Ann. section 40-6-391.

2. On October 30, 2010, the applicant was arrested by the Brunswick Police Department for driving under the influence of alcohol, driving while license suspended or revoked and knowingly driving motor vehicle on suspended, cancelled or revoked registration.

At the time the applicant filed his re-registration application, he submitted court documentation for number one above. The court docket in Case no. [REDACTED] from the Glynn County State Court of Georgia indicates that on October 19, 2010, the applicant pled guilty to driving under the influence of alcohol, a misdemeanor, along with three infractions. The applicant was sentenced to 12 months of confinement; however, it was further ordered that the applicant's sentence be served on probation. The applicant was ordered to serve one day in jail, pay a fine, perform 40 hours of community service and was placed on probation for one year.

On May 18, 2012, the applicant was requested to submit certified judgment and conviction documents from the courts for all arrests. The applicant, in response submitted the following for number two above:

- Court documentation in Case no. [REDACTED] from the Municipal Court of Brunswick, Georgia, which indicates that on November 17, 2010, the applicant pled guilty to driving while license is suspended/revoked, driving with suspended registration and driving under the influence of alcohol. The applicant was ordered to pay a fine and was placed on probation for one year.
- A Motion for New Trial filed on March 8, 2012, indicating that the applicant's plea in Case no. [REDACTED] was not done knowingly and voluntarily with a full understanding of the impact of the plea as charged.
- An Order on Motion for New Trial dated March 8, 2012, in Case no. [REDACTED] from the Municipal Court of Brunswick, Georgia, which indicated that the court found that its previous judgment was contrary to the evidence and law and ordered the case vacated and set aside. The court found that the best interest of justice will be served by sentencing the applicant to a charge of reckless driving. All fines and fees already paid in connection to Case no. [REDACTED] shall apply to this Order.

Convictions that have been vacated due to procedural or substantive defects in the underlying proceedings are no longer valid convictions for immigration purposes. *See Alim v. Gonzales*, 446 F.3d 1239, 1248-50 (11th Cir. 2006), *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006).

Counsel has provided documentation from the court indicating that the convictions of November 17, 2010 have been vacated for underlying procedural or constitutional defect having to do with the merits of the case. Therefore, these misdemeanor convictions no longer affect immigration consequences. *Matter of Adamiak, supra, Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

Counsel provides a memorandum issued by U.S. Citizenship and Immigration Services on January 17, 2010,<sup>1</sup> to support his argument that the applicant's traffic offense of reckless driving in Georgia should not disqualify him from receiving TPS. Counsel's assertion is without merit as the memorandum specifically pertains to traffic infractions and violations committed in the state of New York. The state of Georgia has not classified the above violation to be an infraction.

Any person convicted of reckless driving shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed \$1,000.00 or imprisonment not to exceed 12 months, or by both such fine and imprisonment. Georgia Code Ann. section 40-6-390(b).

As cited above, for immigration purposes, 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. The applicant has been convicted of reckless driving, a misdemeanor offense, within the meaning of section 101(a)(48)(A) of the Act.

The applicant is ineligible for TPS due to his two misdemeanor convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Counsel's statements made on appeal have been considered. Nevertheless, there is no waiver available, even for humanitarian reasons, of the requirements stated above. 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.

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<sup>1</sup>The memorandum, issued by Associate Director, Service Center Operations, and the Chief, AAO, determined that offenses described as violations and traffic infractions in New York should not be considered disqualifying misdemeanors.