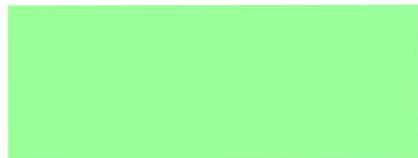


(b)(6)

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



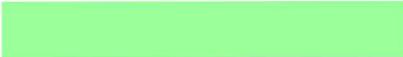
U.S. Citizenship  
and Immigration  
Services



DATE: JAN 24 2014

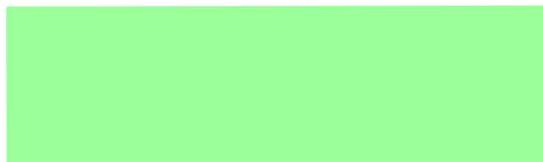
Office: VERMONT SERVICE CENTER

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 (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

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

Ron Rosenberg  
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 appeal will be sustained.

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 has one misdemeanor conviction as his felony conviction was reclassified by the trial court as a misdemeanor pursuant to section 17(b) of the California Penal Code.

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.

Section 101(a)(48)(B) of the Act provides, “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.”

The record reflects that on June 14, 2006, in the Los Angeles County Superior Court, the applicant pled *nolo contendere* to violating one count of section 487(a) of the California Penal Code (PC), grand theft, a felony. Imposition of sentence was suspended, the applicant was placed on probation for three years, ordered to serve one day in the county jail and pay a fine and court cost. Case no. [REDACTED]

On May 4, 2010, the applicant filed a petition and order under section 1203.4 PC. On May 13, 2010, the Los Angeles County Superior Court ordered the felony conviction be reclassified as a misdemeanor pursuant to section 17(b) PC and the conviction was dismissed pursuant to section 1203.4 PC.

The issue in this proceeding is whether the court's subsequent dismissal 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.

The statute under which the applicant was charged, section 487(a) PC is a "wobbler."<sup>1</sup> 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); *In re Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005).

However, the state court's dismissal 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 INA, 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). 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. See *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003).

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<sup>1</sup> Grand theft is punishable as follows: (a) when the grand theft involves the theft of a firearm, by imprisonment, in the state prison for 16 months, two or three years; (b) in all other cases, by imprisonment in a country not exceeding one year or pursuant to subdivision (h) of section 1170. Section 489 PC.

In the instant case, the applicant does not claim any defect in the underlying criminal grand theft for immigration purposes.

The evidence of record reflects that the applicant has one misdemeanor conviction, 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 regulations in 8 C.F.R. § 244.4(a). Therefore, the director's decision to deny the TPS application on this ground will be withdrawn.

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 met this burden.

**ORDER:** The appeal is sustained.