



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE:

**MAR 28 2014**

Office: VERMONT SERVICE CENTER

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The applicant appealed the decision of the AAO. A motion to reopen, rather than an appeal, is the proper forum in this case, pursuant to 8 C.F.R. § 103.5(a)(1)(i). The appeal, therefore, will be treated as a motion to reopen. The motion will be granted, and the previous decision of the AAO will be affirmed.

The applicant is 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.

On February 24, 2011, the director withdrew TPS because the applicant had been convicted of three misdemeanors in the United States. The AAO, in dismissing the appeal on September 16, 2013, concurred with the director's findings.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

On motion, counsel asserts that the AAO erroneously dismissed the appeal as the applicant did provide evidence that his convictions had been vacated. As evidence, counsel submits:

- Certified court documentation from the [REDACTED] indicating that on May 9, 2011, the court set aside the guilty plea of leaving the scene of a motor vehicle accident in Citation Docket no. [REDACTED]
- Certified court documentation from the [REDACTED] indicating that on June 6, 2011, the court set aside the guilty plea of operating without an operator's license in Citation/Docket no. [REDACTED]

Under the current statutory definition of "conviction" provided 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 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). *Matter of Pickering* 23 I&N Dec. 621, 624 (BIA 2003) 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.

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<sup>1</sup> The AAO, in its earlier decision, inadvertently listed the Citation no. as [REDACTED]

On motion, counsel asserts, in pertinent part, “given that the applicant in fact had a driver’s license when he was given the citation and was able to make restitution of the property damage causing both counts 1 and 2 to be vacated.”

Although counsel submitted the court’s orders granting motions to vacate and set aside the prior judgments, she neglected to submit evidence from the court that would show the exact reasons for the vacated convictions. The assertion of counsel does not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In this case, no evidence was submitted on motion indicating that the applicant’s convictions were vacated because of an underlying procedural defect in the merits of the case. Therefore, the vacated convictions remain valid for immigration purposes. The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not sustained that burden. The previous decision of the AAO will not be disturbed.

**ORDER:** The previous decision of the AAO dated September 16, 2013, is affirmed, and the applicant’s TPS remains withdrawn.