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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 1 5 2015 Office: VERMONT SERVICE CENTER FILE:
I-290B:

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DISCUSSION: The applicant's Temporary Protected Status was withdrawn by the Director, Vermont Service Center. 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. § 1254a. On December 9, 2013, the director withdrew TPS because the applicant had been convicted of two misdemeanors in the United States.

On appeal, counsel asserts that the May 8, 2012 conviction should not count against the applicant for TPS purposes because it arose from a constitutionally deficient procedure. Citing to *Matter of Eslamizar*, 23 I&N Dec. 684 (BIA 2004), counsel asserts that a criminal disposition arising from a constitutionally deficient procedure may not be a conviction for immigration purposes, irrespective of its treatment by the state.

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.[1] 8 C.F.R. § 244.1. 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. *Id.*

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

[1] The definition of a misdemeanor under the term "felony" includes an offense which is defined by the State as a misdemeanor and the sentence actually imposed is one year or less regardless of the term such alien actually served. 8 C.F.R. § 244.1.

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 contains the following from the County Juvenile and Domestic Relations District Court for the Commonwealth of Virginia:

1. Court documentation indicating that on 2010, the applicant was arrested and subsequently charged with violating Virginia Code § 18.2-57.2, assault and battery upon a family member, a Class 1 misdemeanor. On 2010, the applicant pled not guilty to and was adjudged not guilty of the offense. The charge was dismissed with prejudice.[2]

2. Court documentation indicating that on 2010, the applicant was arrested and subsequently charged with violating Virginia Code § 18.2-57.2, assault and battery upon a family member, a Class 1 misdemeanor. On 2010, the applicant pled guilty to violating this offense. The court found facts sufficient to find guilt but deferred adjudication/disposition to 2012. On 2012, the applicant was adjudged guilty. The applicant was ordered to pay a fine and costs.

3. Court documentation indicating that on 2012, the applicant was once more arrested and subsequently charged with violating Virginia Code § 18.2-57.2, assault and battery upon a family member, a Class 1 misdemeanor. On 2012, the applicant pled guilty to and was adjudged guilty of violating this offense. The applicant was ordered to serve 90 days in jail (which was suspended) and complete a step-parenting class.

On appeal, the applicant, through counsel, does not contest that the applicant's 2012, conviction is a misdemeanor for TPS purposes. However, counsel asserts that the court record related to the 2012, arrest contains no indication that the applicant's plea was voluntary and knowingly made. Counsel contends the plea, as such, was constitutionally deficient, and therefore not a conviction for TPS purposes. Counsel cites to *Matter of Eslamizar,* 23 I&N Dec. 684 (BIA 2004) to claim that a criminal disposition arising from a constitutionally deficient procedure may not be a conviction for immigration purposes as a collateral matter, irrespective of its treatment by the state.

We find the applicant's assertions are not persuasive. We first note that as the applicant not only pled guilty, but was also tried and found to be guilty by a judge, and the judge ordered 90 days of jail time with 90 days suspended as punishment, the 2012, disposition qualifies as a

[2] Virginia punishes class 1 misdemeanors with "confinement in jail for not more than twelve months and a fine of not more than $2,500, either or both." Virginia code § 18.2-11. As violations of Virginia code § 18.2-57.2 are punishable by imprisonment for a term of one year or less, we affirm that they constitute misdemeanors as defined in 8 C.F.R. §244.1.

conviction under section 101(a)(48)(A) of the Act. In addition, the conviction in *Matter of Eslamizar* was found to not be, as counsel characterizes, a criminal disposition, but rather, a finding that the alien had committed a "violation," as opposed to a "crime," which, under Oregon law, is "tried to the court sitting without a jury, the defendant need not be provided counsel at public expense, and the State need only prove the defendant's violation by a preponderance of the evidence." *Eslamizar*, 23 I. & N. at 687. In this case, there is no indication that the applicant was not afforded these or other safeguards, nor is the record sufficient to meet the applicant's burden of proof in demonstrating that her plea was insufficient to withstand constitutional scrutiny.

We also note that collateral attacks upon an applicant's conviction "do not operate to negate the finality of [the] conviction unless and until the conviction is overturned." *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996). We "cannot go behind the judicial record to determine the guilt or innocence of the alien." *Id.* (citing *Matter of Fortis*, 14 I&N Dec. 576, 577 (BIA 1974); *see also Matter of Khalik*, 17 I&N Dec. 518, 519 (BIA 1980).

We therefore affirm that the applicant has two misdemeanor convictions as defined by section 101(a)(48)(A) of the Act and 8 C.F.R. §244.1 Consequently, we also affirm that the applicant is ineligible for TPS due to her misdemeanor convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). 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.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.