



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: **JUN 01 2015**

FILE: [Redacted]  
APPLICATION RECEIPT: [Redacted]

IN RE: Applicant: [Redacted]

APPLICATION: Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254a

ON BEHALF OF APPLICANT:  
[Redacted]

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,  
  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The application was denied by the Acting Director, Vermont Service Center. The application is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254a. On May 27, 2014, the Acting Director denied the applicant's I-821, Application for Temporary Protected Status (Form I-821), concluding the applicant did not address the applicable qualifying condition under which he submitted Form I-821, and he is not eligible for late registration; he has been convicted of two misdemeanors; and he did not establish his continuous residence, as he was removed from the United States on October 18, 2013.

On appeal, the applicant, through counsel, asserts: He applied for TPS during the initial designation period for El Salvador, and therefore he is eligible to file for late registration; he has not been convicted of two misdemeanors, as one of the convictions was vacated *nunc pro tunc*; and he has not been removed from the United States but has maintained an uninterrupted presence here since he arrived in 1996.

The regulation at 8 C.F.R. § 244.2 provides, in relevant part, that an individual is eligible for TPS upon establishing that he:

- (a) Is a national ... of a foreign state designated under section 244(b) of the Act;
- (b) Has been continuously physically present in the United States since the effective date of the most recent designation of that foreign state;
- (c) Has continuously resided in the United States since such date as the Attorney General [now Secretary of Homeland Security (Secretary)] may designate;
- (d) Is admissible as an immigrant except as provided under section 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f)(1) Registers for [TPS] during the initial registration period announced by public notice in the FEDERAL REGISTER, or
  - (2) During any subsequent extension of such designation if at the time of the initial registration period:
    - (i) The applicant is a nonimmigrant or has been granted voluntary departure status or any relief from removal;
    - (ii) The applicant has an application for change of status, adjustment of



status, asylum, voluntary departure, or any relief from removal which is pending or subject to further review or appeal;

(iii) The applicant is a parolee or has a pending request for reparole; or

(iv) The applicant is a spouse or child of an alien currently eligible to be a TPS registrant.

...

(g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of conditions described in paragraph (f)(2) of this section.

The burden of proof is upon the applicant to establish that he meets the above requirements. The applicant shall submit all documentation as required in the instructions or requested by U.S. Citizenship and Immigration Services (USCIS). See 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet his burden of proof, the applicant must provide supporting documentary evidence of eligibility apart from his own statements, if available. See 8 C.F.R. § 244.9(b).

We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

The first issue to address is whether the applicant is eligible for late registration.

The initial registration period for El Salvadorans was from March 9, 2001 through September 9, 2002. To qualify for late registration, the applicant must provide evidence that during the initial registration period, he fell within at least one of the provisions described in 8 C.F.R. § 244.2(f)(2) above.

The record reflects that the applicant filed his initial TPS application on May 18, 2001. On August 19, 2004, USCIS issued a Request for Evidence (RFE) for a “police clearance and court disposition(s),” as the record indicated that the applicant had been arrested or detained. The applicant responded to the RFE by providing a probation order, and on October 13, 2014, the Director, California Service Center, denied the application because the applicant had not provided a final court disposition. After reopening the matter, on November 30, 2004, the Director denied the TPS application, finding the applicant statutorily ineligible for TPS, because he was convicted on [REDACTED], for two misdemeanors in California.

The applicant filed another TPS application on June 22, 2005. On September 20, 2005, the Director, California Service Center, denied the application, concluding the applicant filed for re-registration for TPS but was not granted TPS previously to qualify for re-registration. On October 18, 2005, the applicant filed an appeal with the AAO, indicating that he filed the June

2005 application as a new application to register for TPS for the first time, and not for re-registration. The applicant also indicated that USCIS incorrectly determined that he was ineligible for TPS because of his criminal record. On January 26, 2007, we dismissed the appeal, concurring with the Director's finding that the applicant was ineligible to re-register for TPS as he did not have the underlying qualifying status to do so. We also determined that the record did not reflect that the applicant attempted to file a late initial application for TPS, and the record lacked evidence that the applicant would be eligible for late registration under 8 C.F.R. § 244.2(f)(2). We further determined the applicant failed to provide sufficient evidence to establish his qualifying continuous physical presence and continuous residence during the requisite periods; and he was statutorily ineligible for TPS because of his convictions for two misdemeanors. We also noted the applicant was ordered removed from the United States *in absentia* in May 1997.

On September 9, 2013, the applicant filed the current TPS application, indicating he was filing his first application to register for TPS. On February 6, 2014, the Acting Director, Vermont Service Center, issued a Notice of Intent to Deny (NOID) because the applicant "did not provide all of the initial and/or additional documentation USCIS requires" upon submitting his application to re-register for TPS, asking the applicant to provide a certified judgment and conviction documents for all of his arrests; the qualifying conditions demonstrating his eligibility to register for TPS under the late registration provisions contained in 8 C.F.R. § 244.2(f)(2); and evidence of his residence in the United States since February 13, 2001, and his continuous physical presence since March 9, 2001. On May 27, 2014, the Acting Director denied the TPS application, concluding the applicant did not address the qualifying conditions enabling him to file for late registration; the applicant established his continuous physical presence from March 9, 2001, until the filing date of his current TPS application, but he did not establish that he still resides in the United States, as he was removed on October 18, 2013; because his removal is not "a brief and innocent absence," it thereby disrupts his continuous residence in the United States; and he was convicted on [REDACTED] of committing two misdemeanors in California.

In support of his appeal, the applicant asserts he applied for TPS during the initial designation period for El Salvador, and he is eligible to seek TPS as a late initial registrant because the regulations at 8 C.F.R. § 244.2 do not require his initial application to have been approved. The applicant asserts that, having filed his initial TPS application, he registered for TPS.

We do not find the applicant's assertions persuasive. The provisions for late registration were created in order to ensure that TPS benefits were made available to individuals who did not register during the initial registration period (March 9, 2001 to September 9, 2002) for the various circumstances specifically identified in the regulations. The record reflects the applicant filed a TPS application during the initial registration period and that application was denied on November 30, 2004. Any Form I-821 subsequently submitted by the same applicant after an initial application is filed and a decision rendered must be considered as either a request for re-registration or as a new filing for TPS benefits. The applicant has not submitted evidence that he has met one of the late-filing provisions outlined in 8 C.F.R. § 244.2(f)(2). Accordingly, we agree with the Acting Director's decision to deny the application for TPS on this ground.

The second issue to be addressed is whether the applicant has been convicted of two misdemeanors. An individual shall not be eligible for TPS if the Secretary finds that the individual has been convicted of any felony or two or more misdemeanors committed in the United States. 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 record reflects that on [REDACTED], the applicant pled guilty to violating sections 23152(a) and (b) of the Vehicle Code of California (V.C.C.) relating to driving under the influence. At the time of the applicant’s guilty pleas, V.C.C. § 23152 provided, in relevant part:

(a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

(b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

According to V.C.C. § 40000.15, violations of V.C.C. § 23152 constitute misdemeanors, not infractions. Based on the applicant’s guilty pleas, the Superior Court of California, [REDACTED] County, imposed a suspended sentence and placed the applicant on informal probation for three years. The applicant also was ordered to pay fines and fees totaling \$1,853, and his driving privileges were restricted for 90 days. The applicant was further ordered to attend a three-month first-offender alcohol program.

Subsequently, the applicant requested that his convictions be set aside and dismissed and that pleas of “not guilty” be entered, pursuant to section 1203.4 of the Penal Code of California (P.C.C.).<sup>1</sup> On [REDACTED] the Superior Court of California, [REDACTED] County, granted the

<sup>1</sup> P.C.C. § 1203.4 provided, in relevant part:

(a) In any case in which a defendant has fulfilled the conditions of probation for the entire period of

applicant's motion and ordered the vacatur of the applicant's guilty plea *nunc pro tunc* regarding his conviction for violating V.C.C. § 23152(a) and dismissed the underlying charge. The Superior Court further ordered that the fines and fees associated with the applicant's conviction for violating V.C.C. § 23152(a) be transferred to his sentence related to his conviction for violating V.C.C. § 23152(b).

In support of his appeal, the applicant asserts that the vacatur of his conviction *nunc pro tunc* was not pursuant to a rehabilitative statute; and accordingly, he has only one misdemeanor conviction and is eligible for TPS.

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*, the BIA reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, an individual remains "'convicted' for immigration purposes." 23 I&N Dec. 621, 624 (BIA 2003); *rev'd on other grounds, Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006).

Because P.C.C. § 1203.4 serves to dismiss, cancel, or vacate a prior conviction as a result of the successful completion of a term of probation, restitution, or other condition of sentencing, it is a rehabilitative statute. The criminal records do not indicate that the vacatur of the applicant's conviction for violating V.C.C. § 23152(a) was on the merits or for a violation of constitutional or statutory rights, and the applicant does not claim any defect in the underlying criminal proceedings. Based on the foregoing, the applicant remains convicted for immigration purposes of the two misdemeanor offenses relating to driving under the influence; and thereby, is ineligible for TPS pursuant to Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Accordingly, we agree with the Acting Director's decision to deny the application for TPS on this ground.

The final issue to be addressed is whether the applicant has established his continuous residence in the United States since February 13, 2001.

probation . . . the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; . . . and . . . the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted . . . .

The term *continuously resided*, as defined in 8 C.F.R. § 244.1, means residing in the United States for the entire period specified in the regulations. An individual shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual and innocent absence as defined within this section or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

An individual applying for TPS offered to El Salvadorans must demonstrate continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. The designation of TPS for El Salvadorans has been extended several times, with the latest extension valid until September 9, 2016, upon the applicant's re-registration during the requisite time period.

The Acting Director, in her decision, noted that the applicant had submitted sufficient evidence to establish his continuous presence in the United States from March 9, 2001, until the date he filed his TPS application, but he did not establish that he continues to reside in the United States, as he was removed on October 18, 2013.

In support of his appeal, the applicant asserts that he was not removed from the United States on October 18, 2013, but was taken into the custody of U.S. Immigration and Customs Enforcement (ICE) officials. He also asserts that he is under the supervision of ICE, and he has not interrupted his continuous physical presence. In support of his assertions, the applicant submits several identity documents, a letter of support from his church, letters of support from his employer, income tax returns, and utility and billing statements demonstrating his residence and employment in the United States from 1997 through 2013.

The record reflects that on May 12, 1997, the immigration judge ordered the applicant deported to El Salvador. The record also reflects the applicant did not appeal the judge's decision, and thereby, he is subject to a final order. The record further reflects ICE officials apprehended the applicant at his place of employment on October 18, 2013, and issued to him an Order of Supervision. The record contains a Warrant of Removal/Deportation (Form I-205) issued to the applicant upon his apprehension. The second page of Form I-205, titled, "port, date, and manner of removal," and the sections concerning the verification of the applicant's departure, however, are blank.

Based on the foregoing, we cannot conclude that the applicant was removed on October 18, 2013. Accordingly, we withdraw the Acting Director's finding that the applicant was removed from the United States. However, the most recent evidence submitted in support of the applicant's continuous residence is a gas utility billing statement for services from June 26 through July 26, 2013. The applicant filed his appeal on June 19, 2014. The appeal does not include evidence concerning the applicant's residence since August 2013. Although the applicant's appeal indicates the applicant currently resides in the United States, and the applicant was issued employment authorization from April 18, 2015 through April 17, 2016, we cannot conclude the record contains sufficient, independent evidence of the applicant's residence. Accordingly, we find that the applicant has not established his continuous residence in the



United States since February 13, 2001 pursuant to section 244(c)(1)(A)(ii) of the Act, and therefore we agree with the Acting Director's decision to deny the application for TPS on this ground.

Based on the foregoing, beyond the decision of the Acting Director, we further find that the record does not contain sufficient evidence establishing the applicant's continuous physical presence in the United States since March 9, 2001 pursuant to section 244(c)(1)(A)(i) of the Act. Accordingly, the application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial, and the applicant's appeal will be dismissed.

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.