



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **JUN 05 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) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Michael Rosenberg
for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The applicant's Temporary Protected Status was withdrawn, and the re-registration denied by the Director, Vermont Service Center Director. It is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a citizen of El Salvador who is applying for Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254. The record reveals that the applicant filed a TPS application during the initial registration period, which was approved, and subsequently re-registered for TPS.

On March 5, 2014, the director withdrew TPS and denied the re-registration application, after determining that the applicant had been convicted of two felony offenses, burglary under section 459 of the California Penal Code and perjury under section 118(a). The director also stated, however, that the applicant had not submitted a final disposition of these charges, or a final disposition for an arrest on [REDACTED] 2006 for false statement in an application for registration under 8 U.S.C. § 1306(c).

On appeal, the applicant concedes that he pled guilty to the charges of burglary and perjury. He contends, however, that the convictions have been vacated, and therefore, he is not ineligible for TPS. He submits a brief and additional evidence. Previously, in response to a notice of intent to deny the applicant's re-registration application, the applicant argued that he had not been convicted of burglary and perjury for immigration purposes, given that the court did not order any penalty despite his guilty plea. The applicant has not renewed that argument on appeal.

The issue in this proceeding is whether the applicant was and remains convicted of a felony for immigration purposes, and is, therefore, ineligible for TPS.

The director may withdraw the status of an alien granted Temporary Protected Status 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).

"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.

The burden of proof is upon the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by U.S.

Citizenship and Immigration Services (USCIS). 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 or her burden of proof, the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. 8 C.F.R. § 244.9(b).

The record of proceedings reflects that on [REDACTED] 2012, the applicant pled guilty to the following two (2) felonies in State Court: perjury, in violation of section 118(a) of California Penal Code, and burglary in violation of section 459 of California Penal Code. Sentencing was deferred and the applicant was referred to the probation department.

Counsel contends that although the applicant pled guilty to the two felony charges, they were “effectively and formally vacated by the Superior Court of California on [REDACTED] 2014.” Counsel further asserts that as the Superior Court of California dismissed the charges and vacated the applicant’s perjury and burglary convictions under California code section 1385, “in furtherance of justice,” the applicant no longer has a felony conviction and is not ineligible for TPS.

Under section 101(a)(48) of the Act:

(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if 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.

(B) 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.

Under the current statutory definition of “conviction” as set forth in 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 Rolandan*, 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, does not expunge a conviction for immigration purposes. *See id.* at 523, 528; *see also Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (reiterating that if a conviction is

vacated for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains “convicted” for immigration purposes).

The Transcript of Proceeding, dated March 7, 2014, submitted on appeal, indicates that sentencing in the applicant’s case was continued for 18 months, and that per the prior settlement of the case, the judge was then to dismiss the case. In requesting earlier dismissal of the charges, applicant’s counsel explained:

What happened, your Honor, is that, as pointed out in the declaration, there are some very new circumstances regarding [the applicant]. When [the case was settled], [the Judge] indicated he was going to dismiss the case. ... Unfortunately, my client is involved in immigration proceedings, so we are asking for dismissal just a couple months early. [The applicant] has been completely law-abiding. No violations whatsoever. ...”

The reference declaration is not in the record. However, it is noted that in a January 27, 2014 support letter from the applicant’s counsel in the criminal matter, which gave the status of the case, counsel stated: “At the time [the applicant] last appeared for hearing [REDACTED] 2012), the Superior Court Judge, ... made it clear to the parties that he did not wish to have [the applicant’s] T.P.S. status jeopardized as a result of [the] case. He granted [the applicant] a deferred prosecution wherein all charges would be dismissed against him.”

This evidence shows the applicant having pled guilty, with the court ordering a probationary status and withholding further adjudication and sentencing. We find sufficient information to support that the applicant was convicted for immigration purposes, and the applicant does not contest this on appeal. The criminal charges were subsequently dismissed on rehabilitative grounds, or to assist the applicant in avoiding immigration consequences. The record of proceeding does not indicate a procedural or substantive defect as the basis for the dismissal. As discussed above, post-conviction relief for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings does not eliminate a conviction for immigration purposes. For immigration purposes the applicant remains convicted of these felony offenses under section 101(a)(48) of the Act.

Therefore, the applicant has one or more felony convictions and is ineligible for TPS pursuant to section 244(c)(2)(B)(i) of the Act. Therefore, the director’s decision to deny the re-registration application and withdraw TPS is 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.