



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JUN 18 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:

INSTRUCTIONS:

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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, withdrew the applicant's Temporary Protected Status. The matter is now before the Administrative Appeals Office (AAO) 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 6, 2013, the director withdrew TPS because the applicant had failed to submit requested court documentation relating to an arrest on March 22, 2013 for three counts of assault and battery upon a family member.

On appeal, counsel asserts that the applicant was not convicted of the assault and battery offenses of March 22, 2003 because the applicant was not convicted under section 101(a)(48)(A)(i) of the Act. Counsel contends that no formal judgment against the applicant has been entered and the applicant was ordered to submit to psychological treatment, which is not a punishment, but rather a rehabilitative treatment.

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. 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.

Applicants shall submit all documentation as required in the instructions or requested by U.S. Citizenship and Immigration Services. 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. 8 C.F.R. § 244.9(b). To meet his or her burden of proof the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. *Id.*

The record reflects that on August 30, 2013, the director issued a Notice of Intent to Deny, which requested that the applicant submit certified judgment and conviction documents from the courts for all arrests including his arrest on [REDACTED] 2013, in the Commonwealth of Virginia, by the [REDACTED] Police Department for violating three counts Virginia Code § 18.2-57.2, assault and battery upon a family member. The applicant failed to respond to the notice. Accordingly, the director withdrew TPS as the applicant failed to submit evidence necessary for the proper adjudication of the application.

On appeal, counsel submits the following:

1. Three separate court documents from the [REDACTED] Juvenile and Domestic Relations District Court for the Commonwealth of Virginia, which indicate that on [REDACTED] 2013, the applicant was charged with violating three counts of Virginia Code § 18.2-57.2, assault and battery upon a family member, Class 1 misdemeanors. In each case, the court found facts sufficient to find guilt but deferred adjudication/disposition to [REDACTED] 2015. The applicant was ordered to attend an anger management program for two of the counts and a domestic violence program for the last.
2. A letter dated [REDACTED] 2013, from a representative for the Center for Marriage and Family Counseling in [REDACTED] Virginia, who indicated that the applicant had completed the required number of domestic violence/anger control groups.
3. An unpublished AAO decision.

While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all U.S. Citizenship and Immigration Services employees in the administration of the Act, unpublished decisions are not similarly binding.

Virginia Code § 18.2-57.3 provides;

- A. When a person is charged with a violation of § 18.2-57.2, the court may defer the proceedings against such person, without a finding of guilt, and place him on probation under the terms of this section.
- B. For a person to be eligible for such deferral, the court shall find that (i) the person was an adult at the time of the commission of the offense, (ii) the person has not previously been convicted of any offense under this article or under any statute of the United States or of any state or any ordinance of any local government relating to assault and battery against a family or household member, (iii) the person has not previously had a proceeding against him for violation of such an offense dismissed as provided in this section, (iv) the person pleads guilty

to, or enters a plea of not guilty or nolo contendere and the court finds the evidence is sufficient to find the person guilty of, a violation of § 18.2-57.2, and (v) the person consents to such deferral.

On October 15, 2014, we sent a notice to the applicant informing him that it was our intent to dismiss the appeal as the court documents submitted were incomplete and did not overcome the director's finding. The applicant was advised that the court documents submitted on appeal indicated that a "Plea and Recommendation" had been entered; however, the actual pleas (guilty, not guilty or nolo contendere) to each charge were not listed. The applicant was requested to submit either certified complete court proceedings or a certified letter from the State/District Attorney's Office specifying his plea for each charge of assault and battery. The applicant, however, failed to submit the requested documents as required under 8 C.F.R. § 244.9(a).

Counsel, in response, resubmits the court documents along with a document dated May 13, 2014 from the [REDACTED] Police Department indicating that its criminal records have been checked under the applicant's name and no charges were found. Counsel reiterates that the applicant has not been convicted within the meaning of section 101(a)(48)(A) of the Act, as psychological treatment is not a punishment and that there is no formal judgment of guilt. However, each court disposition indicates that the applicant entered a plea and the judge found facts sufficient to find guilt and ordered some form of punishment or restraint on the applicant's liberty. For immigration purposes the applicant remains convicted of the misdemeanor offenses within the meaning of section 101(a)(48)(A) of the Act.

Counsel asserts that the programs that the applicant was ordered to attend, for domestic violence and anger management, are not punishment or restraints on the applicant's liberty. In support of this contention, counsel cites to case law concerning the provision of medical services to inmates and a criminal procedure statute concerning a mental examination for an insanity defense. Inasmuch as this matter concerns the definition of a conviction under the Act rather than duties in criminal matters, counsel has not provided sufficient support for his assertion that court-ordered anger management or attendance at a domestic violence program are not forms of punishment, penalty or restraint on the alien's liberty under section 101(a)(48)(A) of the Act.

Where an alien pleads guilty or nolo contendere, or is found guilty, but entry of the judgment is deferred by the court to allow for a period of probation and/or completion of a diversion program, the alien has been convicted for immigration purposes even if the charges are later dismissed. See *Matter of Marroquin-Garcia*, 23 I&N Dec. 705, 714-15 (A.G. 2005); *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999).

By contrast, an alien has *not* been convicted for immigration purposes where the criminal charges were dismissed following successful completion of a pretrial diversion program which occurred prior to any pleading or finding of guilt. *Matter of Grullon*, 20 I&N Dec. 12, 14-15 (BIA 1989) (citing *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988)). For there to be no conviction in such a case, the alien must not have entered a plea of guilty or nolo contendere and

there must have been no adjudication of guilt or imposition of punishment or restraint by a court. *Id.*

The applicant is ineligible for the benefit sought as he has been convicted of the above Class 1 misdemeanors within the meaning of section 101(a)(48)(A) of the Act. Section 244(c)(2)(B)(i) of the Act, 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 not be disturbed.

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.