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**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



**U.S. Citizenship  
and Immigration  
Services**

M2

[REDACTED]

DATE: **SEP 30 2011** Office: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:

[REDACTED]

**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the Vermont Service Center. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the Vermont Service Center by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The applicant's Temporary Protected Status (TPS) was withdrawn and an application for re-registration was simultaneously denied due to abandonment by the Director, Vermont Service Center. 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 is seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director withdrew the applicant's TPS because the applicant had failed to submit requested court documentation relating to his criminal record.

On appeal, counsel submits the requested court documentation. Counsel citing *Retuta v. Holder*, 591 F.3d 1181 (9<sup>th</sup> Cir. 2010)<sup>1</sup> asserts that there is no conviction because the applicant received "deferred entry of judgment for two years, on condition of completion of a controlled-substance program, with a no penalty imposed."

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. Section 244(c)(3)(A) of the Act and 8 C.F.R. § 244.14(a)(1).

An alien shall not be eligible for TPS 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. 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 Federal Bureau of Investigation report dated March 17, 2010, reflects that on February 20, 2010, the applicant was arrested by the Sheriff's Office of Norwalk, California for one count of possession of a narcotic controlled substance.

On January 28, 2011, a Notice of Intent to Withdraw TPS was issued, which requested the applicant to submit the certified judgment and conviction documents for all arrests. The

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<sup>1</sup> The Ninth Circuit held that an unconditional suspended non-incarceratory sanction that has no present effect is not a punishment, penalty, or restraint of liberty under 8 U.S.C. § 1101(a)(48). ("Our reading of § 1101(a)(48) leads us to conclude that the definition of 'conviction' does not include criminal judgments whose only consequence is a suspended nonincarceratory sanction. Our reading of subsection (A) and of subsection (B) confirms that an unconditional nonincarceratory suspended sanction cannot be a predicate for a 'conviction.'")

applicant was provided until March 2, 2011 to submit the requested documentation. The applicant, however, failed to respond to the notice. On June 1, 2011, the director determined that the applicant had failed to submit evidence necessary for the proper adjudication of the application and withdrew the applicant's TPS.

On appeal, counsel submits the requested court documentation in Case no. [REDACTED] from the Los Angeles County Superior Court, which reflects that on June 24, 2011, the applicant pled guilty to violating section 11350(a) H&S, possession of a narcotic controlled substance, a felony. The court accepted the applicant's plea, granted deferred entry of judgment for a period of two years, and ordered that the applicant pay a diversion restitution fine of \$100 and that he enroll and successfully complete an approved controlled substance treatment program.

Contrary to counsel's assertion, [REDACTED] does not apply in the instant case as the court documentation does not indicate that an unconditional suspended non-incarceratory sanction was imposed.

The applicant is ineligible for TPS due to his felony conviction. 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 deny the application for this reason will be 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.