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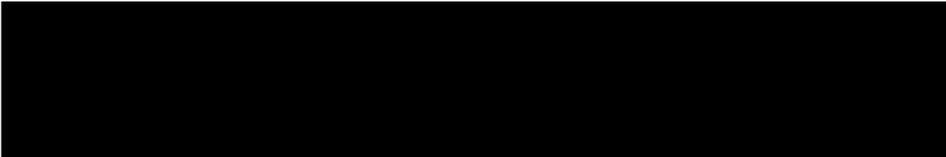
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



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

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: AUG 15 2007  
[WAC 05 215 70409]  
[SRC 01 183 56608]

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the California Service Center. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The applicant's Temporary Protected Status (TPS) was withdrawn by the Director, California Service Center (CSC), and the re-registration application was denied. The case 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 TPS on March 22, 2004. The CSC Director subsequently withdrew the applicant's status and denied the re-registration application on August 11, 2006, when it was determined that the applicant had been convicted of two misdemeanors in the United States.

On appeal, counsel states the applicant has only one conviction for a misdemeanor and therefore he is eligible for TPS. Counsel submits an Order from a County/Circuit Judge of the Twentieth Judicial Circuit in and for Collier County, Florida Criminal Division dated July 13, 2006 setting aside the applicant's second conviction. Counsel argues that "from the beginning of this matter, our position has been that the second conviction had been entered in error."

Citizenship and Immigration Services may withdraw TPS if the alien was not eligible at the time the status was granted, or if he or she becomes ineligible for TPS. 8 C.F.R. § 244.14(a)(1).

Section 244(c) of the Act, and the related regulations at 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state designated by the Attorney General is eligible for TPS only if such alien establishes that he or she:

- (a) Is a national of a 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 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 Temporary Protected Status 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.

An alien shall not be eligible for temporary protected status 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. Section 244(c)(2)(B)(i) of the Act and the regulations at 8 C.F.R. § 244.4(a).

The regulations at 8 C.F.R. § 244.1 define "felony" and "misdemeanor" as:

*Felony* means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except: 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 such alien actually served. Under this exception for purposes of section 244 of the Act, the crime shall be treated as a misdemeanor.

*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.

On November 13, 2004, the applicant was arrested by the Sheriff's Office of Collier County in Naples, Florida after the pickup he was driving collided with multiple vehicles. He was issued two citations, the first for driving under the influence and the second for driving under the influence "W/ PROPERTY DAMAGE \$2,200.00). (Report Number [REDACTED])

The record reflects the following convictions:

- (1) On December 9, 2004, the applicant was convicted by a County Court Judge in the County Court of the Twentieth Judicial Circuit in and for Collier County, Florida, of "DUI W/PERSON/PROPERTY DAMAGE" (Case Number [REDACTED] Count/Crime 1, a misdemeanor). He was ordered to pay fines and costs of \$920 and to serve one year probation.
- (2) On December 9, 2004, the applicant was convicted by a County Court Judge in the County Court of the Twentieth Judicial Circuit in and for Collier County, Florida, of "DUI W/PERSON/PROPERTY DAMAGE" (Case Number [REDACTED] Count/Crime 2, a misdemeanor). He was ordered to pay fines and costs of \$655 and to serve one year probation.

As stated above, counsel submits an Order from a County/Circuit Judge of the Twentieth Judicial Circuit in and for Collier County, Florida Criminal Division dated July 13, 2006 setting aside the applicant's second conviction. The Order indicates that the second Count was set aside after "the Court having heard argument of counsel and being otherwise advised in the premises." On appeal, counsel argues that the second conviction had been entered in error. However, the Order does not indicate that error was a factor in the Court's determination. It is noted that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

Under section 101(a)(48) of the Immigration and Nationality Act, a conviction means a formal judgment of guilt entered by a court or, if adjudication of guilt was withheld, where the alien has entered a plea of guilty or nolo contendere, or has admitted sufficient facts to warrant a finding of guilt, and, the judge has ordered some form of punishment, penalty or restraint on the alien's liberty, regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part. The applicant pled guilty to both charges and punishment was ordered for each conviction. Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under state law. State rehabilitative actions that do not vacate a conviction on the merits are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). There is no evidence in the record suggesting that the second conviction was set aside based on the merits of the case. Therefore, despite the setting aside of the second conviction, the applicant remains convicted, for immigration purposes, of the two misdemeanors detailed above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to withdraw TPS and deny the re-registration application is affirmed.

An alien applying for temporary protected status 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.