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

(b)(6)

[redacted]

DATE: JUN 2 6 2013

Office: NEBRASKA SERVICE CENTER

[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]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case.

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 Nebraska 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Nebraska Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion will be dismissed. The order dismissing the appeal will be affirmed.

The applicant claims to be a native and citizen of Haiti 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 denied the application because it was determined that the applicant had been convicted of a felony in the United States.

On appeal, counsel asserted that the applicant's arrest for leaving the scene of personal injury resulted in a misdemeanor conviction. The AAO determined that the applicant had been convicted of two misdemeanors and dismissed the applicant's appeal.

On motion, counsel states that the applicant is seeking reconsideration and/or reopening concerning the state "false name" charge "which was not the focus of the Nebraska Service Center's original decision."[1] Counsel contends that the "false name" charge should not be used to disqualify the applicant from TPS.

Pursuant to the Memorandum for Service Center Operations and the AAO dated January 17, 2010, for purposes of the TPS statute and regulations, United States Citizenship and Immigration Services (USCIS) has determined that New York traffic infractions should not be considered disqualifying misdemeanors.

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. 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, 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

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[1] The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.

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. Section 101(a)(48)(B) of the Act.

The record reflects that on May 17, 2010 and August 6, 2010, the applicant was requested to submit certified judgment and conviction documents for all arrests. The applicant, in response, submitted:

1. Court documentation in Case indicating that on February 10, 2005, the applicant was arrested by the Police Department for assault and battery-domestic and assault with a dangerous weapon. On June 28, 2005, the case was dismissed.

2. Court documentation in Case no. indicating that on March 25, 2006, the applicant was arrested by the Police Department for refusing to identify oneself to a police officer while operating a motor vehicle and unlicensed operation of a motor vehicle. On March 27, 2006, the case was dismissed.

3. Court documentation in Case no. indicating that on May 14, 2006, the applicant was arrested by the Police Department for assault by dangerous weapon. On September 27, 2006, the case was dismissed.

4. Court documentation in Case from the Court indicating that on June 15, 2006, the applicant pled guilty to and was found guilty of leaving scene of personal injury, a violation of chapter 90, section 24(2)(a ½)(1). The applicant's sentence of six months was suspended. The remaining charge of unlicensed operation of motor vehicle was dismissed.

5. Court documentation in indicating that on November 1, 2006, the applicant pled guilty to violating M.G.L. chapter 268, section 34(a), false name/SSN, arrestee furnish. Sufficient facts were found, but the case was continued without guilty finding for six months. On May 10, 2007, the case was dismissed.

The director, in denying the application, noted, in pertinent part:

> Specifically, you were arrested on March 29, 2006 by the Boston Police Department and charged with "Leaving the Scene of Personal Injury" Massachusetts Gen. Laws c.90 sec.24(2)(a). This charge was "continued without a finding," but since the defendant was required to enter a guilty plea or admit sufficient facts before receiving probation it qualified as a conviction for immigration purposes.

The AAO determined after a review of the court documents, that the applicant's 'continued without guilty finding' relates to a violation of M.G.L. chapter 268, section 34(a), in Case no. The court found the applicant guilty of violating M.G.L. chapter 90, section 24(2)(a ½)(1) in

Massachusetts law provides that a violation of M.G.L. chapter 90, section 24(2)(a ½)(1) is punishable by a fine of not less than $500 and not more than $1000 and by imprisonment of not less than six months but not more than two years.

If the court documentation does not specify whether the defendant is being charged with a felony or a misdemeanor, an offense with this type of alternate punishment is considered a "felony" unless the defendant is in fact fined or sentenced to county jail, in which case the state considers the offense a "misdemeanor". *See MacFarlane v. Department of Alcoholic Beverage Control*, 326 P.2d 165, 167 (1958), 330 P.2d 769, 772 (1958). (In *MacFarlane*, the defendant's six-month jail sentence was suspended, and he was placed on probation; the court determined that the defendant had been convicted of a misdemeanor, not a felony.) Therefore, the AAO declared the offense to be a misdemeanor because the applicant was sentenced to serve 60 days in the house of correction as condition of probation.

In this case, the court documentation submitted reflects that the applicant pled guilty to violating M.G.L. chapter 90, section 24(2)(a½)(1) and the judge ordered some form of punishment. Therefore, the applicant has been "convicted" of this misdemeanor offense for immigration purposes.

Massachusetts law provides that a violation of M.G.L. chapter 268, section 34(a) is punishable by a fine of not more than $1000 or by imprisonment of not more than one year or by both fine and imprisonment. The Massachusetts Sentencing Commission defines this offense as a misdemeanor.[2] A guilty plea that results in a continued without a finding is a conviction for immigration purposes.[3]

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[2] *See* http://www.gov/courts/admin/sentcomm/mastercrimlist.pdf

[3] *See United States v. Morillo*, 178 F.3d 18 (1st Cir. 1999).

On motion, counsel provides a memorandum issued by U.S. Citizenship and Immigration Services on January 17, 2010,[4] to support his argument that the applicant should not be disqualified from receiving TPS. Counsel states that "[a]lthough there technically was a 'misdemeanor,' [the applicant] asks the AAO to look at the facts of his case and the disposition in conjunction with the statutory language and "in view of the reasoning" in the Memorandum and find that he is eligible for TPS.

Counsel's assertion is not persuasive as the memorandum specifically pertains to traffic infractions and violations committed in the state of New York. The state of Massachusetts has not classified the above violation to be an infraction.

Accordingly, the AAO determines that the applicant is ineligible for TPS due to his two misdemeanor convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

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.

Accordingly, the motion will be dismissed and the previous decision of the AAO will not be disturbed.

As noted by the AAO in its previous decision, a removal hearing was held on January 5, 2001, and the applicant was ordered removed from the United States.

The burden of proof in these proceedings rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. That burden has not been met.

ORDER: The motion is dismissed.

[4]The memorandum, issued by Associate Director, Service Center Operations, and the Chief, AAO, determined that offenses described as violations and traffic infractions in New York should not be considered disqualifying misdemeanors.