

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

A large, stylized handwritten signature in black ink, appearing to be the initials "MI".



FILE: 

Office: VERMONT SERVICE CENTER

Date: JUN 01 2004

IN RE: Applicant: 

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 office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to be "R. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center, and 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 is seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director determined that the applicant is ineligible for TPS because he was inadmissible to the United States, pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II).

On appeal, counsel asserts that the director's determination that the applicant was convicted of criminal possession of a controlled substance with intent to sell, and criminal possession of a controlled substance was incorrect. Rather, the applicant was convicted of simple possession of a controlled substance, a misdemeanor, and one violation.

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

- (a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign 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 TPS 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.

Pursuant to section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a), an alien shall not be eligible for temporary protected status if the Attorney General [now the Secretary of the Department of Homeland Security (the Secretary)] finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States.

8 C.F.R. § 244.1 defines "felony" and "misdemeanor:"

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 felony or misdemeanor.

Section 212(a)(2) of the Act, 8 U.S.C. § 1182(a)(2), provides that aliens inadmissible and ineligible to receive visas and ineligible to be admitted to the United States include:

(A)(i) Any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of --

* * *

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802).

The record reflects the following:

1. On July 25, 1999, in the First District Court of Nassau County, New York, the applicant was charged with Count 1, criminal possession of a controlled substance with intent to sell, New York Penal Law (PL) 220.16; and Count 2, criminal possession of a controlled substance, PL 220.03. PL 220.16 (Count 1) was reduced to PL 220.03, and PL 220.03 (Count 2) was covered by PL 220.03 (Count 1). On December 7, 1999, the applicant entered a plea of guilty to PL 220.03. He was sentenced to 20 days in jail, fined \$500, driver's license suspended for 6 months, and placed on probation for 3 years.

2. On July 7, 1999, in the District Court of the County of Suffolk, New York, the applicant was charged with Count 1, operating a motor vehicle (MV) under influence of drug or alcohol, NY Vehicle & Traffic Law (VTL) 1192.2; Count 2, operating MV under influence of drug or alcohol, VTL 1192.3; Count 3, operating MV by unlicensed driver, VTL 509.1; Count 4, driving on shoulders and slopes, VTL 1131; Count 5, operating

vehicles without safety seats/belts, VTL 1229C.3. The applicant entered a plea of guilty to the reduced charge of VTL 1192.1, driving while ability impaired. He was fined \$500, sentenced to one-year conditional discharge, and driver's licensed suspended for 90 days. Counts 2, 3, 4, and 5 were dismissed.

3. The Federal Bureau of Investigation (FBI) report, contained in the record of proceeding, reflects that on November 2, 1994, in Houston, Texas, the applicant was arrested and charged with "theft shoplifting." The court's final disposition of this arrest is not contained in the record.

Counsel, on appeal, asserts that the applicant was convicted of only one misdemeanor (PL 220.03, paragraph 1 above), and that his conviction of VTL 1192.1 (paragraph 2 above) is a violation.

Although New York VTL 1193.1 states that driving while ability impaired (VTL 1192.1) shall be a traffic infraction, VTL 1193.1 further states that this crime "shall be punishable by a fine of not less than three hundred dollars nor more than five hundred dollars or by **imprisonment in a penitentiary or county jail for not more than fifteen days**, or by both such fine and imprisonment." (Emphasis added.)

Consequently, VTL 1192.1 is a misdemeanor as defined in 8 C.F.R. § 244.1. The applicant is, therefore, ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on his two misdemeanor convictions committed in the United States. The applicant is also inadmissible to the United States, pursuant to section 212(a)(2)(A)(i)(II) of the Act, based on his conviction of criminal possession of a controlled substance. There is no waiver available to an alien found inadmissible under this section pursuant to 8 C.F.R. § 244.3(c)(1).

The burden of proof is upon the applicant to establish that he 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 appeal will be dismissed.

ORDER: The appeal is dismissed.