



U.S. Citizenship  
and Immigration  
Services

MI

[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date: OCT 01 2004

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:

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

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**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

**DISCUSSION:** The application was denied by the Director, Texas 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 was ineligible for TPS because he had been convicted of two or more misdemeanors committed in the United States. The director, therefore, denied the application.

On appeal, counsel asserts that the applicant's sentence for his July 24, 1994 conviction was suspended; therefore, the lack of sentence does not qualify this crime as a misdemeanor because it was "a level 5" and no time was served. He states that he has been unable to locate the applicant's June 8, 2000 conviction and needs additional time in which to do so. To date, however, no additional evidence has been furnished. Counsel further states that the applicant is in the process of receiving a motion for appropriate relief in North Carolina State Courts that would eliminate his July 24, 1994 conviction, and he would seek the same relief if there is a June 8, 2000 offense.

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.

The record reflects the following:

1. On July 24, 1994, in North Carolina, Case No. 94CR 047824, the applicant was arrested and charged with Count 1, driving while impaired, a misdemeanor; and Count 2, revocation of driver's license. On February 13, 1995, in the Superior Court of Mecklenburg County, North Carolina, the applicant was convicted of Count 1. Sentence was suspended and the applicant was placed on probation for a period of one year, and was ordered to pay \$300 in fines and costs. The final disposition as to Count 2 is not reflected in the record.

2. On September 15, 1995, in North Carolina, Case No. 95CR 067852, the applicant was arrested and charged with driving while license revoked, a misdemeanor. On November 15, 1995, the applicant was convicted of the charge and he was ordered to pay \$60 in costs.

3. The Federal Bureau of Investigation (FBI) report reflects that on April 15, 1999, in North Carolina, the applicant, under the name of [REDACTED] was arrested and charged with "intoxicated and disruptive," a misdemeanor. On February 3, 2002, under Court Docket No. 1999CR 015238, the court dismissed the case.

4. The FBI report reflects that on June 8, 2000, in North Carolina, the applicant, under the name of [REDACTED] was arrested and charged with driving while impaired, a misdemeanor. On

November 9, 2000, in the District Court of Mecklenburg County, North Carolina, Docket No. 2000CR 024052, the applicant was convicted of the charge. He was sentenced to imprisonment for a period of 120 days, placed on probation for a period of one year, and was ordered to pay \$200 in fines and costs.

Counsel, on appeal, asserts that the applicant was given a suspended sentence and ordered to pay \$300 for his conviction listed in paragraph 1 above; therefore, the lack of sentence does not qualify this crime as a misdemeanor because it was "a level 5" and no time was served. Counsel's assertion is not persuasive. Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines the term "conviction:"

(48)(A) 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 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.

(B) 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.** (Emphasis added.)

Notwithstanding the fact that the applicant's sentence was suspended, the record reflects that the applicant entered a plea of guilty and the judge ordered some form of punishment (one year of probation and \$300 in fines and costs). The applicant, therefore, had been convicted within the meaning of section 101(a)(48)(A) of the Act.

Furthermore, the Board of Immigration Appeals, in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), determined that under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Therefore, even if the applicant's conviction were to be dismissed as counsel claims on appeal, the applicant would remain convicted for immigration purposes.

Accordingly, the applicant is ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on his two or more misdemeanor convictions. There is no waiver available to an alien convicted of a felony or two or more misdemeanors committed in the United States.

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.