



U.S. Citizenship
and Immigration
Services

10/1

[Redacted]

FILE:

[Redacted]

Office: SAN FRANCISCO

Date:

OCT 28 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

Identifying data deleted to
protect privacy

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DISCUSSION: The application was denied by the District Director, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, claiming to be a native and citizen of El Salvador, is seeking Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The district director determined that the applicant was ineligible for TPS because she failed to establish that she is a national of El Salvador. The director, therefore, denied the application.

On appeal, the applicant asserts that due to confusion pertaining to her voluntary departure in 1985, she "was mistakenly designated a Guatemalan;" however, she was very scared and did not correct the problem at that time. The applicant submits documentation to establish that she is a national of El Salvador.

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 § 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.

The term *continuously resided*, as defined in 8 C.F.R. § 244.1, means residing in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual, and innocent absence as defined within this section or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

The term *continuously physically present*, as defined in 8 C.F.R. § 244.1, means actual physical presence in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences as defined within this section.

The record of proceedings contains Form I-213, Record of Deportable Alien, issued on September 28, 1985, indicating that the applicant, under the name of [REDACTED] File No. [REDACTED] was apprehended in San Mateo, California. The Form I-213 shows that the applicant "had stated that she told the apprehending officers that she was a citizen of Mexico and that she wanted to return to Mexico. Subject was then processed as a Mexican citizen and returned to Mexico through the port of Calexico, California." The Form I-213 further shows that upon the applicant's arrival in Mexico, Mexican officials discovered that she was in fact a citizen of Guatemala, and she was subsequently returned to the United States Border Patrol for processing. She requested a voluntary return to Guatemala. It is noted in the Form I-213 that the applicant claimed she was born in Guatemala City, Guatemala, that her father (Miguel) is a Guatemalan national, and that her mother [REDACTED] is also a Guatemalan national.

The applicant is now claiming to be a national of El Salvador. She submits copies of her El Salvadoran passport issued on October 30, 2002, her El Salvadoran "Cedula" personal identification card, and a birth certificate reflecting that she was born in El Salvador on July 8, 1954.

The nationality the applicant claimed and/or established at the time she first came into contact with CIS was that of Mexico and ultimately that of Guatemalan. The record is clear in establishing that the applicant elected to present herself as a national of Guatemala to the United States government at the time of her entry into the United States on September 28, 1985. The applicant's attempt to explain the situation on appeal is not persuasive.

The applicant has failed to establish that she is a national of a state designated under section 244(b) of the Act. Accordingly, the district director's decision to deny the application for this reason will be affirmed.

Beyond the decision of the district director, the Federal Bureau of Investigation (FBI) fingerprint results report, contained in the record of proceeding, reflects the following regarding the applicant:

1. Arrested on September 18, 1984, in Redwood City, California, and charged with petty theft (name used: [REDACTED])
2. Arrested on November 24, 1984, in Redwood City, California, and charged with petty theft (name used: [REDACTED])

3. Arrested on March 17, 1985, in San Francisco, California, and charged with petty theft (name used: [REDACTED])
4. Arrested on August 22, 1993, in Antioch, California, and charged with petty theft (name used: [REDACTED])

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.

In response to the district director's request on September 24, 2002, to submit certified copies of police records and court dispositions of any and all arrests and/or convictions, the applicant submits:

5. A letter from the Superior Court of California, County of San Mateo, Criminal Division, indicating that based on a thorough search of the court records for [REDACTED] Case No. [REDACTED] was found, and that "pursuant to Government Code Section 68150 through 68153, all misdemeanor records ten (10) years and older are purged and destroyed."
6. A letter from the Superior Court of California, County of San Mateo, Criminal Division, indicating that based on a thorough search of the court records for [REDACTED] Case No. [REDACTED] was found, and that "pursuant to Government Code Section 68150 through 68153, all misdemeanor records ten (10) years and older are purged and destroyed."
7. A criminal history record of the San Francisco Police Department indicating that their record shows an arrest for Carmen Rodriguez on March 17, 1985, for petty theft, 488 PC, "DISP: 06-29-1990 MC, 5 YR OLD BW PURGED PER COURT ORDER."

While No. 7 above appears to relate to the arrest listed in No. 3 above, it is not clear in the record whether Nos. 5 and 6 above relate to any of the arrests listed in the FBI report. Further, the purging and destruction of the offenses listed in Nos. 5, 6, and 7 above are not evidence of dismissals or expungements of convictions. However, even if the convictions were, in fact, dismissed, 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, the applicant would remain convicted of Nos. 5, 6, and 7 above for immigration purposes. Further, the applicant, in a statement attached to her application for temporary protected status, Form I-821, filed on November 30, 2001, states: "I was arrested 3 times for shoplifting between 1984 and 1985. I received fines, all of which I paid." Furthermore, the applicant failed to submit the court disposition of the August 22, 1993 arrest for petty theft in Antioch, California (No. 4 above).

Accordingly, the applicant is ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on her record of at least two 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 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.