

U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

Administrative Appeals Office
U.S. Citizenship and Immigration Services

Administrative Appeals Office

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FILE: [Redacted]
[WAC 03 032 53895]

OFFICE: CALIFORNIA SERVICE CENTER DATE: AUG 05 2005

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center. The application is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant claims to be 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 denied the application because he found the applicant had been convicted of a felony.

On appeal, counsel submits a statement. Counsel further indicates that a brief and/or additional evidence would be submitted within 30 days of the filing of the appeal. To date, no brief or evidence has been received. Therefore, the record will be considered complete.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state 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.

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. See Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a).

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 misdemeanor.

The record reveals the following offenses:

- (1) On June 17, 1986, the applicant was arrested in Los Angeles, California, and charged with one count of burglary in violation of section 459 PC, a misdemeanor.
- (2) On August 5, 1987, the applicant was arrested in Los Angeles, California, and charged with one count of vandalism with property damage in violation of section 594(a)(2) PC, a misdemeanor. It appears from the California Department of Justice (CDOJ) Criminal History transcript that the applicant was convicted of this charge on October 15, 1987. However, the actual court disposition for this offense has not been provided.
- (3) On May 26, 1988, the applicant was arrested in Los Angeles, California, and charged with burglary in violation of section 459 PC, a misdemeanor. It appears from the CDOJ transcript that prosecution was declined in this case. However, the actual court disposition for this offense has not been provided.

- (4) On August 17, 1988, the applicant was arrested in Los Angeles, California, and charged with giving, transporting, or selling over one ounce of marijuana in violation of section 11360(a) H&S, a felony. It appears from the CDOJ transcript that the applicant was convicted of this charge on September 23, 1988, in the Superior Court of California, County of Los Angeles. However, the actual final court disposition for this offense has not been provided.
- (5) On April 13, 1989, the applicant was arrested by police officers in Los Angeles, California, under the name [REDACTED] and charged with assault with a deadly weapon in violation of section 245(a)(1) PC, a felony. It appears from the CDOJ transcript that the applicant was subsequently convicted of this offense. However, the actual court disposition of this offense has not been provided.
- (6) On August 18, 1991, the applicant was arrested and charged with shoplifting in violation of section 484(a) PC, a misdemeanor. (Case [REDACTED] On October 17, 1991, the charge was dismissed in the furtherance of justice.

Pursuant to a Notice of Intent to Deny dated February 28, 2003, the applicant was requested to provide the final court disposition for each of his arrests. In response, the applicant provided a letter dated March 14, 2003, from [REDACTED] Executive Officer and Clerk of the Superior Court, stating that a criminal record search was conducted for the names [REDACTED] AKA [REDACTED] and [REDACTED]

[REDACTED] date of birth July 29, 1964, and no record was found within the court's jurisdiction from January 1, 1989 to March 14, 2003, the date of [REDACTED] letter. The applicant also provided a final court disposition of the charge detailed in No. (6) above, confirming that the charge of shoplifting in violation of section 484(a) PC was dismissed in the furtherance of justice on October 17, 1991, along with a copy of the CDOJ Criminal History Transcript previously submitted in connection with the applicant's Form I-485, Application to Register Permanent Residence or Adjust Status.

On appeal, counsel states that she is in the process of having the applicant's September 2, 1988 conviction vacated. Counsel has failed to submit any evidence that such action was granted by the court.

It is noted that, according to the CDOJ transcript, the conviction detailed in No. (4) above due to the arrest on August 17, 1988, was reduced to a misdemeanor on September 17, 2004, pursuant to section 17 PC, and on April 27, 2005, the conviction was set aside and dismissed pursuant to section 1204.4 PC.

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).

Therefore, even if the court did grant such actions, under immigration statute and regulations, the applicant would remain convicted of a felony offense detailed in No. (4).

The applicant has failed to provide any evidence revealing the final court disposition of his arrests detailed in No. (1) through (5) above. The applicant is ineligible for temporary protected status because of his failure to provide information necessary for the adjudication of his application. 8 C.F.R. § 244.9(a).

It is noted for the record that the applicant was apprehended by the United States Border Patrol on September 9, 1984, in San Diego, California. He was subsequently deported from the United States on October 18, 1984. His application for extended voluntary departure pursuant to the Family Fairness Program was denied on October 22, 1990, because he failed to establish that he was the single child, under 18, of a legalized alien. The notice of denial stated that, by applying for extended voluntary departure under the Family Fairness Program, the applicant was identifying himself as a deportable alien, and he would be scheduled for a removal hearing before an Immigration Judge. There is no indication in the record that removal proceedings were instituted as a result of the denial of the application for extended voluntary departure.

The applicant subsequently filed a Form I-212, Application for Permission to Reapply for Admission in the United States After Deportation or Removal, on July 16, 1993. The application was approved on October 20, 1993, because it was determined that the applicant was not required to apply for permission to reapply for admission into the United States.

It is further noted that the applicant is the beneficiary of an approved Form I-130, Petition for Alien Relative, filed on his behalf by his mother, [REDACTED]

The applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, on November 23, 1994. He also filed a Form I-601, Application for Waiver of Grounds of Inadmissibility, on that date. His Form I-601 was denied by the Interim District Director, Los Angeles, on May 5, 2003, because his conviction on the charge of selling marijuana in violation of section 11360(a) H&S does not meet the statutory definition of a drug offense that can be waived under section 212(h) of the Act. His application for adjustment of status was denied on June 30, 2003, because he is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, and his application for waiver of ground of inadmissibility was denied.

Additionally, the CDOJ transcript reflects the applicant was later arrested in Hollywood, California, on April 17, 2003, and charged with driving under the influence of alcohol in violation of section 23152(A) VC, a misdemeanor. The final disposition of this arrest also has not been provided.

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.