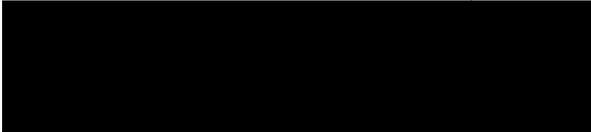


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FILE: [REDACTED]
[EAC 01 167 51135]

OFFICE: VERMONT SERVICE CENTER

DATE: AUG 25 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:



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.


for

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 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 the applicant had been convicted of two misdemeanors committed in the United States.

On appeal, counsel submits a statement.

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 10, 2002, in the General District Court, Arlington, Virginia, the applicant entered a plea of guilty to failure to appear, VA Code § 19.2-128, a misdemeanor. The court found the applicant guilty of the offense, and he was ordered to pay \$192 in fines and costs, and placed on probation for a period of 9 months.
- (2) On June 10, 2002, in the General District Court, Arlington, Virginia, the applicant entered a plea of guilty to driving while intoxicated (DWI with .08 percent blood alcohol level or more), VA Code § 18.2-266, a Class 1 misdemeanor. The court found the applicant guilty of the offense. Imposition of 100 days of jail sentence was suspended, and he was placed on probation for a period of 9 months, his driver’s license was suspended for 12 months, and he was ordered to pay \$272 in fines and costs.

On appeal, counsel asserts that the applicant’s conviction of DWI was a traffic infraction, and that his sentence to 100 days of confinement was suspended and he did not serve any jail time. He states that the failure to appear was directly related to the applicant’s DWI, that he failed to appear the first time the hearing was scheduled because of a mistake in the paperwork provided to him, and that even though he pled guilty to the charge, he appeared before the court when he became aware of the new date of his court hearing. Counsel further asserts that “the infractions came about and represent a single scheme of criminal misconduct under 8 U.S.C. § 1227(a)(2)(A)(ii).”

Despite counsel’s assertions, the court record clearly shows the applicant was convicted of the offense of failure to appear. Citizenship and Immigration Services (CIS) is required to rely on the court record as it stands, and cannot make determinations of guilt or innocence based on that record. Furthermore, CIS may only look to the judicial records to determine whether the person has been convicted of the crime, and may not look behind the conviction to reach an independent determination concerning guilt or innocence. *Pablo v. INS*, 72 F.3d 110, 113 (9th Cir. 1995); *Gouveia v. INS*, 980 F.2d 814, 817 (1st Cir. 1992); and *Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991).

Furthermore, counsel's assertion that the applicant's convictions are traffic infractions is not persuasive. The record shows that the applicant was convicted of violating VA Code § 18.2-266, a Class 1 misdemeanor. According to VA Code § 18.2-11, punishment for "Class 1 misdemeanor is confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both." Additionally, according to VA Code § 19.2-128, if the offense for which a defendant failed to appear is a felony, the offense for failure to appear is a class 6 felony; if the offense is a misdemeanor, the offense for failure to appear is a Class 1 misdemeanor. The record shows that DWI is a Class 1 misdemeanor; therefore, failure to appear is a Class 1 misdemeanor.

Moreover, although the applicant's sentences were suspended and he did not serve any time in jail, section 101(a)(48)(B) of the Act, 8 U.S.C. § 1101(a)(48)(B), states that, "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). Further, 8 C.F.R. § 244.1 defines "misdemeanor" to mean a crime punishable for a term of one year or less, **regardless of the term such alien actually served**, if any.

In addition, while the determination of whether the applicant's crimes arose "out of a single scheme of criminal misconduct" may be relevant to his removability under section 237 of the Act [8 U.S.C. § 1227(a)(2)(A)(ii)], this determination has no bearing on his eligibility for TPS or his admissibility under section 212(a) of the Act. According to the court dispositions, the applicant was charged with two separate offenses, he clearly pled guilty to two separate crimes, and the court ordered two separate punishments. Therefore, the applicant had been convicted of two separate and distinct misdemeanor offenses. Moreover, Congress did not make any special allowances for TPS applicants who had been convicted of multiple counts under the same criminal case.

Accordingly, the applicant is ineligible for TPS due to his two misdemeanor convictions, detailed in Nos. 1 and 2 above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the application for this reason will be affirmed.

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.