



U.S. Citizenship
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Services

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FILE:



[EAC 02 239 50405]

Office: VERMONT SERVICE CENTER

Date: FEB 08 2005

IN RE:

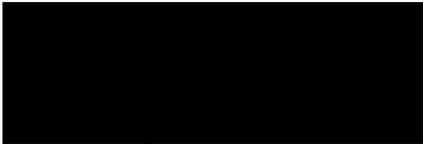
Applicant:



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.

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 had failed to submit all requested court documentation relating to his criminal record. The director, therefore, denied the application.

On appeal, counsel submits a statement and additional documents.

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 Federal Bureau of Investigation (FBI) fingerprint results report shows that the applicant was arrested and charged, in Maryland: (1) on April 29, 1994, for possession of a controlled dangerous substance; and (2) on November 5, 1996, for theft. In response to the director's request of April 29, 2003, to submit the court's final disposition of these charges, the applicant submitted the record of the District Court of Maryland (Case No. [REDACTED] indicating that on January 10, 1997, a "nolle prosequi" was entered on the case relating to the applicant's charge for theft. Because the applicant failed to submit the court disposition of his arrest for possession of a controlled substance (No. 1 above), the director denied the application.

On appeal, counsel submits a letter from the District Court of Maryland, Fifth District, stating: "The only information available from the courts is the attached printout, it is the courts policy that after three years the cases are destroyed and nothing is left but a computer printout. The charge for Mr. [REDACTED] a misdemeanor in the State of Maryland." The computer printout of the District Court shows that on May 18, 1994, the applicant was convicted of possession of a controlled dangerous substance (Case [REDACTED] He was placed on probation for a period of one year, ordered to spend 6 months in jail (5 months, 10 days suspended), and pay the total of \$150 in fines and costs.

The applicant, through counsel, asserts that neither private counsel nor the public defender were available to him at the time of his hearing, that his constitutional 6th Amendment right to counsel was neglected, his legal rights were violated, and his immigration status was prejudiced by failure on the part of the District Court of Maryland to provide him with the constitutionally mandated legal counsel. He further asserts that he has retained an attorney who advised him of the possibility of having the charge removed.

The Administrative Appeals Office (AAO) is not the appropriate forum to determine constitutional issues involving the applicant's convictions. Rather, those issues are within the jurisdiction of the judicial court. Furthermore, the AAO may only look to the judicial records to determine whether the person had 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). It is noted that even if the applicant's conviction were to be dismissed, the Board of Immigration Appeals, in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), held 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.

The applicant's conviction of possession of a controlled dangerous substance renders him inadmissible to the United States pursuant to section 212(a)(2)(a)(i)(II) of the Act. Therefore, the applicant is ineligible for TPS pursuant to section 244(c)(1)(A)(iii) of the Act. There is no waiver available to an alien found inadmissible under this section. 8 C.F.R. § 244.3(c)(1). Therefore, the director's decision to deny the application will be affirmed.

The burden of proof is upon the applicant to establish 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.