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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] OFFICE: VERMONT SERVICE CENTER DATE: JUN 02 2005
[EAC 02 041 51638]

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: Self-represented

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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: (1) failed to establish that he had been continuously physically present in the United States from March 9, 2001, to the date of filing his application; and (2) failed to submit the final court disposition of any and all arrests.

On appeal, the applicant submits a statement and additional evidence, including evidence and court documents previously furnished and contained in the record.

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.

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy 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 USC 802). Section 212(a)(2)(A)(i)(II) of the Act.

The record reveals the following offenses:

- (1) On July 2, 2001, in the Chelsea District Court, Massachusetts, Docket No. [REDACTED] (arrest date July 1, 2001), the applicant was indicted for Count 1, assault with a dangerous weapon, c265 §15(b); and Count 2, assault, c265 §13(a); and Count 3, assault, c265 §13(a). On January 16, 2002, the case was dismissed without prejudice for failure to prosecute.
- (2) On November 29, 2001, in the East Boston District Court, Massachusetts, Docket No. [REDACTED] (arrest date November 28, 2001), the applicant was indicted for Count 1, assault to rob while armed, c265 §18(b); and Count 2, assault to rob while armed, c265 §18(b). On January 15, 2002, the court amended the complaint to "assault with dangerous weapon, C265 §15B," as to both counts. On December 11, 2002, the case was "DISMISSED FOR WANT PROS."
- (3) On March 4, 2002, in the East Boston District Court, Massachusetts, Docket No. [REDACTED] (arrest date November 28, 2001), the applicant was indicted for Count 1, attempt to commit a crime, c274 §6; and Count 2, attempt to commit a crime, c274 §6. On December 11, 2002, the case was "DISMISSED FOR WANT PROS."

- (4) On April 1, 2002, in the East Boston District Court, Massachusetts, Docket No. [REDACTED] (arrest date March 30, 2002), the applicant was indicted for Count 1, possession of a class D drug, c94C §34; and Count 2, carrying a dangerous weapon, c269 §10(b). While the court, on March 19, 2003, entered, "TOP [tender of plea] filed and accepted after colloquy," the court also indicated that "Sufficient facts found but continued without guilty finding [CWOFF] until: 9-19-03," and the applicant was placed on unsupervised probation. The final outcome of this case is not contained in the record.
- (5) The Federal Bureau of Investigation fingerprint results report indicates that the applicant was arrested on June 2, 2002, in Boston, Massachusetts, for assault and battery by means of a dangerous weapon. The final court disposition of this arrest is not contained in the record.
- (6) On September 17, 2002, in the Commonwealth of Massachusetts, the applicant was arrested for minor transporting/carrying alcohol. The final court disposition of this arrest is not contained in the record.

The court, in No. 4 above, indicated that on March 19, 2003, tender of plea was filed and accepted after colloquy. No evidence was furnished to show the outcome of the continued hearing regarding this case on September 19, 2003. On October 16, 2002, and again on June 10, 2003, the applicant was requested to submit the final court disposition of every charge against him. He was advised that the charges and dispositions must be specifically identified (not just numeric citations or codes), and to submit a copy of the pertinent statute, sentencing guide or statement from the court clerk. These were not furnished by the applicant.

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.

The record in No. 4 above shows that the applicant entered a plea of guilty to possession of a controlled substance and carrying a dangerous weapon, both misdemeanor offenses, and that the judge ordered some form of punishment; in this case, unsupervised probation. Therefore, the applicant was convicted of these offenses.

The applicant is ineligible for TPS due to her two misdemeanor convictions, and because he is inadmissible to the United States pursuant to under section 212(a)(2)(A)(i)(II) of the Act based on his drug-related conviction. Sections 244(c)(2)(B)(i) and 244(c)(1)(A)(iii) of the Act. Additionally, the applicant has failed to provide information necessary for the adjudication of his application (Nos. 4, 5, and 6 above). 8 C.F.R. § 244.9(a). Consequently, the director's decision to deny the application will be affirmed.

The next issue in this proceeding is whether the applicant has established his continuous physical presence in the United States from March 9, 2001, to the date of filing the application.

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.

Persons applying for TPS offered to El Salvadorans must demonstrate entry on or prior to February 13, 2001, continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. On July 9, 2002, the Attorney General announced an extension of the TPS designation until September 9, 2003. A subsequent extension of the TPS designation has been granted by the Secretary of the Department of Homeland Security, with validity until September 9, 2006, upon the applicant's re-registration during the requisite time period.

The applicant filed his TPS application on October 5, 2001. On October 16, 2002, and again on June 10, 2003, the applicant was requested to submit additional evidence establishing his continuous residence in the United States since February 13, 2001, and continuous physical presence from March 9, 2001 to the date of filing the TPS application.

The director noted that in response to his second notice, the applicant had furnished sufficient evidence to satisfy the requirements for continuous residence in the United States as of February 13, 2001; however, the evidence did not satisfy the requirements for continuous physical presence from March 9, 2001, to the date of filing his application on October 5, 2001. The director, therefore, denied the application on August 26, 2003.

On appeal, the applicant submits the following:

- (1) Resubmitted copies of court records reflecting arrests on July 1, 2001; November 28, 2001; and March 30, 2002.
- (2) Copies of pay statements dated March 8, 2001; March 29, 2001; April 5, 2001; and November 27, 2001.
- (3) A payment receipt from [REDACTED] Attorney at Law, dated July 11, 2001.
- (4) Commonwealth of Massachusetts court record regarding an arrest on September 19, 2002.

The evidence furnished by the applicant on appeal, in conjunction with other evidence included in the record of proceeding, establishes that the applicant satisfies the residence and physical presence requirements described in 8 C.F.R. § 244.2(b) and (c). Therefore, the applicant has overcome these findings of the director.

However, the applicant remains ineligible for TPS due to his two misdemeanor convictions detailed in No. 4 above, because he is inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act due to his drug-related conviction, and because he has failed to provide information necessary for the adjudication of his application. Consequently, the director's decision to deny the application 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.