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**U.S. Citizenship
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FILE:



[EAC 02 279 53692]

OFFICE: VERMONT SERVICE CENTER

DATE: JUN 13 2005

IN RE:

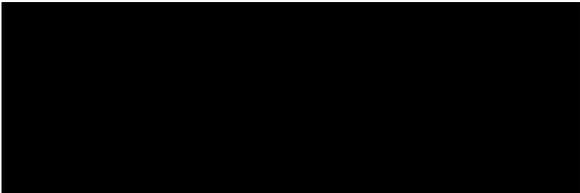
Applicant:



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 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 determined that the applicant had failed to submit the requested final court disposition of every charge against him. He also determined that the applicant had failed to submit sufficient evidence to establish continuous residence in the United States since February 13, 2001. The director, therefore, denied the application on April 28, 2003.

On appeal, counsel submits a statement and additional evidence.

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.

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 Department of Homeland Security, with validity until September 9, 2006, upon the applicant's re-registration during the requisite time period.

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, 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 applicant, on appeal, provides the court records reflecting the following:

- (1) On September 15, 2000, in the Frederick-Winchester General District Court, Virginia, the applicant was found guilty of unlawful possession of marijuana, 18.2-250.1 Virginia Code, a

Class 1 misdemeanor. He was placed on probation and ordered to pay \$500 in fines and costs, and his driver's license was revoked for a period of 6 months. Because the applicant completed the terms of his probation, on July 20, 2001, the case was dismissed.

On appeal, counsel asserts that the applicant's failure to submit the requested documents was not intentional. He states that the applicant relied on his prior attorney and that he believed the documents were sent. Counsel further asserts that the applicant's only conviction was for a misdemeanor, he was given a suspended sentence of probation and 6 months loss of his driver's license which he completed on July 20, 2001.

While one court document of the above case shows that deferred adjudication was entered by the court on September 15, 2002, another court document shows that the applicant was "guilty as charged." Regardless, 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 indicates that the applicant was found guilty and the judge ordered some form of punishment (probation, \$500 in fines and costs, and driver's license revoked). Therefore, the applicant has been convicted within the meaning of section 101(a)(48)(A) of the Act.

The record further indicates that based on the applicant's completion of the terms of his probation, the case was dismissed on July 20, 2001. However, 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, the applicant remains convicted, for immigration purposes, of the misdemeanor offense of unlawful possession of marijuana despite the dismissal of the conviction.

The applicant is ineligible for TPS 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. Section 244(c)(1)(A)(iii) of the Act. There is no waiver available to an alien found inadmissible under this section. *See* 8 C.F.R. § 244.3(c)(1).

The applicant, on appeal, furnished additional evidence in an attempt to establish his qualifying residence and physical presence in the United States described in 8 C.F.R. § 244.2(b) and (c). This evidence, however, does not mitigate the fact that the applicant is statutorily ineligible for TPS based on his inadmissibility to the United States pursuant to pursuant to section 212(a)(2)(A)(i)(II) of the Act. Accordingly, the director's decision to deny the application will be affirmed.

It is noted that the record of proceeding contains the Form I-821, Application for Temporary Protected Status, initially filed on March 23, 2001 (EAC 01 157 53312). A request for evidence was sent to the applicant on December 12, 2001, requesting that the applicant submit evidence to show that he had resided in the United States since February 13, 2001, and evidence to show that he had been continuously physically present in the United States from March 9, 2001, to the date of filing his application. A second request for evidence, also dated December 12, 2001, was sent to the applicant requesting that he submit the final court disposition of every charge against him. A subsequent request for evidence was sent to the applicant on February 25, 2002,

requesting that he submit the final court disposition of every charge against him. The director denied this application on July 25, 2002, because the applicant, in response to the director's requests, failed to submit the final court disposition of his arrest for possession of marijuana. There is no evidence in the record that the applicant appealed the director's decision to deny this application.

It is further noted that the Federal Bureau of Investigation report shows that the applicant was apprehended at El Centro, California, on August 11, 1995, and he was subsequently placed in removal proceedings.

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.