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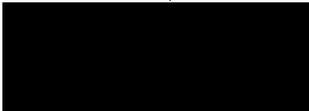
U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: DENVER

Date:

JUN 17 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*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the District Director, Denver, Colorado, and is now before the Administrative Appeals Office (AAO) on appeal. The district director's decision will be withdrawn, and the appeal will be sustained.

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 district director determined that the applicant had failed to establish that he had been continuously physically present in the United States since February 13, 2001.<sup>1</sup> He further determined that the applicant had been convicted of a felony or two or more misdemeanors committed in the United States. The district director, therefore, denied the application.

On appeal, counsel submits a statement and additional evidence. Counsel requests 60 days in which to file a written brief and/or submit additional evidence. To date, the file contains no further response from the applicant. Therefore, the record shall be considered complete.

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 § 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

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<sup>1</sup> The actual requirements for TPS for El Salvadorans are continuous residence since February 13, 2001, and continuous physical presence since March 9, 2001.

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.

- (g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of condition described in paragraph (f)(2) of this section.

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 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.

The record reflects that on February 14, 1999, in Salt Lake City, Utah, the applicant was arrested and charged with Count 1, protective order violation, a misdemeanor; and Count 2, disorderly conduct, a misdemeanor. On November 29, 1999, in the Third District Court, State of Utah, Salt Lake County, Murray Department, Case No. [REDACTED] the applicant's plea was held in abeyance for 12 months, and he was ordered to pay \$150 in court costs, as to Count 1. Count 2 was dismissed. On March 6, 2000, a warrant was issued for the applicant's arrest in regards to Count 1. The record of the Third District Court shows that on June 29, 2000, the warrant was recalled, that the applicant's fines were paid in full, and that on "November 9<sup>th</sup> prob. ends will be dismissed." While the court's record of dismissal is not contained in the record of proceeding, it is noted that the Utah Criminal History Record dated February 24, 2003, indicates that this case was dismissed on December 14, 2000.

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, for immigration purposes, the applicant remains convicted of the one misdemeanor offense (Count 1 above).

The record, in this case, shows that the applicant was convicted of only one misdemeanor offense. As the applicant's single misdemeanor conviction does not render him ineligible for TPS pursuant to section 244(c)(2)(B)(i) of the Act, this finding of the director will be withdrawn.

The next issue in this proceeding is whether the applicant has established his continuous residence in the United States since February 13, 2001, and his continuous physical presence in the United States since March 9, 2001.

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 record shows that the applicant filed his TPS application on June 14, 2001. On January 7, 2002, the applicant was provided an opportunity to submit evidence to establish that he has been continuously physically present in the United States since February 13, 2001. Because he failed to comply, the district director denied the application.

Counsel, on appeal, submits copies of the applicant's Form W-2 Wage and Tax Statement for 2001 and a letter from the Internal Revenue Service (IRS) dated May 28, 2001, regarding the tax period for December 31, 2000. Counsel asserts that the district director's decision was erroneous because he failed to consider the bona fide evidence of the applicant's continuous physical presence submitted with his TPS application. He states that the applicant submitted employment records, paycheck stubs, IRS Forms W-2 Wage and Tax Statements, an IRS Federal Tax Return, a letter from his employer in affidavit form, an attestation by the church, and the medical records of the applicant's children.

Based on documents contained in the record of proceeding, including documents furnished on appeal, it is concluded that the applicant has furnished sufficient documentation to establish that he has continuously resided in the United States since February 13, 2001, and has been continuously physically present since March 9, 2001. Therefore, the applicant also has overcome this finding of the director,

It is noted that the TPS application was forwarded to the District Director, Denver, by the Director, Nebraska Service Center (NSC) on November 11, 2001, but that subsequent re-registration application(s) were properly filed with the NSC.

It also is noted that the applicant was previously apprehended at Chula Vista, California (on January 11, 1991), and placed in removal proceedings.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden. The appeal will be sustained.

**ORDER:** The director's decision is withdrawn, and the appeal is sustained.