

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



M

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAY 25 2005**
[WAC 01 295 52438]

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 "R. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California 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 denied the application because the applicant had failed to submit sufficient evidence: (1) to establish continuous residence in the United States since February 13, 2001; (2) to establish continuous physical presence since March 9, 2001; (3) to establish his identity; and (4) final court disposition of his arrests.

On appeal, the applicant 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 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.

- (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.

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 felony or 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 record reveals the following offenses:

- (1) The records of the [REDACTED] Police Department, California, shows that on March 6, 1997, the applicant was arrested for being under the influence of a controlled substance, 11550 H&S, a misdemeanor. The arrest report shows that the applicant was subsequently convicted of this offense on July 9, 1997. However, the court's final disposition of this arrest is not contained in the record of proceeding.
- (2) The applicant was arrested on May 5, 1997, for failure to appear, 40508(b) VC, a misdemeanor. On May 20, 2003, in the Superior Court of California, County of Santa Clara, Case No. [REDACTED] the misdemeanor offense was amended to an infraction. The applicant was ordered to pay \$298 in fines and costs.

- (3) The applicant was arrested on July 28, 1997, for failure to appear, 40508(b) VC, a misdemeanor. On May 20, 2003, in the Superior Court of California, County of Santa Clara, Case No. [REDACTED] the misdemeanor offense was amended to an infraction. The applicant was ordered to pay \$298 in fines and costs.
- (4) On October 18, 2000, in the Superior Court of California, County of Santa Clara, Case No. [REDACTED] (arrest date July 22, 1997), the applicant was convicted of being under the influence of a controlled substance, 11550 H&S, a misdemeanor. He was placed on probation for a period of 2 years, ordered to spend 5 days in jail, and pay \$100 in fines and costs
- (5) On October 18, 2000, in the Superior Court of California, County of Santa Clara, Case No. [REDACTED] (arrest date March 4, 1997), the applicant was convicted of being under the influence of a controlled substance, 11550 H&S, a misdemeanor. He was placed on probation for a period of 2 years, ordered to spend 5 days in jail, and pay \$100 in fines and costs.
- (6) The applicant was arrested on April 10, 2001, for Count 1, possession of a controlled substance, 11377(a) H&S, a misdemeanor; Count 2, being under influence of a controlled substance, 11550(a) H&S, a misdemeanor; Count 3, possession of device, instrument, or paraphernalia, 11364 H&S, a misdemeanor; and Count 4, disturbing the peace, 415.1 PC, an infraction. The applicant subsequently pled guilty to these offenses. Because the applicant's probation was successfully completed and terminated, on September 20, 2002, the Superior Court of California, County of Santa Clara (Case No. [REDACTED]) set aside the guilty pleas and dismissed the case.
- (7) The records of the San Jose Police Department, California, shows that on December 19, 2001, the applicant was convicted of driving without a valid driver's license, 12500(a), a misdemeanor (arrest date May 6, 2001). However, the actual final court disposition of this arrest is not contained in the record of proceeding.
- (8) On July 25, 2002, in the Superior Court of California, County of Santa Clara, Case No. [REDACTED] (arrest date September 27, 2001), the applicant was convicted of driving without a valid driver's license, 12500(a), a misdemeanor. Sentence was suspended.
- (9) On August 27, 2002, in the Superior Court of California, County of Santa Clara, Case No. [REDACTED] (arrest date April 27, 2001), the applicant was convicted of driving without a valid driver's license, 12500(a), a misdemeanor. Sentence was suspended.

Despite the dismissal of the applicant's convictions detailed in No. 6 above, 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. Therefore, the applicant remains convicted, for immigration purposes, of the offenses listed in No. 6 above.

The applicant is ineligible for TPS due to his record of at least eight 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 convictions. Sections 244(c)(2)(B)(i) and 244(c)(1)(A)(iii) of the Act. Consequently, the director's decision to deny the application will be affirmed.

The next issue in this proceeding is whether the applicant has established continuous residence in the United States since February 13, 2001, and continuous physical presence 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 applicant filed his TPS application on September 13, 2001. On March 25, 2003, the applicant was requested to submit additional evidence establishing his continuous residence in the United States since February 13, 2001, continuous physical presence from March 9, 2001, to the date of filing the TPS application, and documentation to establish his identity. On April 29, 2003, the applicant responded to the director's notice and requested that he be granted an additional 45 days in which to obtain requested documents because he was scheduled to appear at the traffic court on May 20, 2003, regarding an arrest.

The director determined that the applicant had not submitted sufficient evidence and denied the application on July 2, 2003.

On appeal, the applicant asserts that on April 15, 2003, he responded to the director's request for evidence and that he requested for an additional 45 days in which to obtain final court dispositions. He further asserts that he subsequently sent all the requested documents on June 16, 2003. He submits copies of documents previously furnished.

It is noted that on June 26, 2003, prior to the director's decision to deny, the Service Center received the applicant's response to the director's request for additional evidence. The applicant furnished numerous documents including the following:

- (1) Copies of California Identification Card issued on July 15, 1999, and his El Salvadoran birth certificate and English translation.
- (2) A copy of a receipt from [REDACTED] of San Jose dated February 9, 2000.
- (3) Copies of Bank of the West statements regarding the applicant's account for the dates from January 1, 2001 to April 1, 2002, inclusive.
- (4) Copies of earnings statements from [REDACTED] for pay periods from January 23, 2001 to October 31, 2002, inclusive. Copies of pay checks received accompanied each of the earnings statements.

- (5) Copies of Santa Clara Valley Medical Center statements dated February 13, 2001 and May 21, 2001.
- (6) A copy of Memorial Hospital Los Banos statement dated June 29, 2001.
- (7) Copies of Sprint statements for October 28, 2001 and January 29, 2002.
- (8) Copies of AT&T Broadband statement of service for April 17, 2002; October 10, 2002; and April 1, 2003.
- (9) A copy of Coast National Insurance Company, Inc. statement dated August 15, 2002.
- (10) A copy of Costco Optical invoice dated January 15, 2003.

The evidence furnished by the applicant, 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 record of at least eight misdemeanor convictions and because he is inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act. Consequently, 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. The appeal will be dismissed.

ORDER: The appeal is dismissed.