



U.S. Citizenship
and Immigration
Services

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FILE:



OFFICE: VERMONT SERVICE CENTER

DATE:

NOV 09 2005

[EAC 01 194 55552]

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 Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained and the application will be approved.

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 been convicted of two misdemeanors committed in the United States.

On appeal, counsel asserts that the applicant pled guilty to a driving while intoxicated offense, but that he was adjudicated as a Youthful Offender, which is not a judgment of conviction in New York.

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.

The record reveals the following offenses:

- (1) On November 15, 2002, in Yaphank, New York, the applicant was arrested for Count 1, operating a motor vehicle while under the influence of drug or alcohol, VTL 1192.3, a misdemeanor; Count 2, operating a motor vehicle while under the influence of drug or alcohol, VTL 1192.3, a misdemeanor; Count 3, refusal to take breath test, VTL 1194.1; and Count 4, failure to stop, VTL 1172.A. On June 5, 2003, in the District Court of the County of Suffolk, First District Court, Central Islip, New York, Docket No. [REDACTED], the applicant pled guilty to Count 1, as a Youthful Offender. He was placed on probation for a period of 3 years, ordered to spend 60 days in jail, fined \$500, had his license revoked for one year, with this sentence to be served concurrently with that of No. 2 below.
- (2) On June 5, 2003, in the District Court of the County of Suffolk, First District Court, Central Islip, New York, Docket No. [REDACTED] (arrest date April 19, 2003), the applicant was convicted of operating a motor vehicle while under the influence of drug or alcohol, VTL 1192.3, a misdemeanor. He was placed on probation for a period of 3 years, ordered to spend 60 days in jail, fined \$500, and his license was revoked for one year.

The Board of Immigration Appeals, in *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000), held that adjudication of youthful offender status or juvenile delinquency is not a conviction for immigration purposes.

The record, in this case, indicates that the applicant was convicted of only one misdemeanor offense (No. 2 above). As the applicant is not ineligible for TPS based on this conviction, pursuant to section 244(c)(2)(B)(i) of the Act, this finding of the director will be withdrawn.

The applicant has submitted sufficient evidence to establish that he has met the continuous residence and continuous physical presence requirements described in 8 C.F.R. §§ 244.2(b) and (c). Therefore, the director's decision will be withdrawn and the application will be approved.

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.

ORDER: The appeal is sustained and the application is approved.