



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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

MI

FILE:



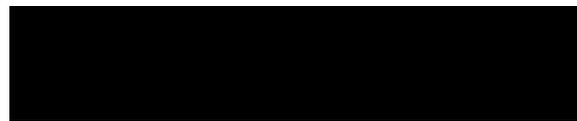
Office: TEXAS SERVICE CENTER

Date: OCT 03 2005

[SRC 01 225 70790]

IN RE:

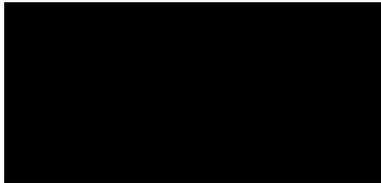
Applicant:



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, Texas 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 was convicted of two misdemeanors committed in the United States.

On appeal, counsel states:

1. The Notice of Decision letter is incorrect when it states that the applicant has been convicted of having violated any control substance act. The applicant has not been convicted of any such violation.
2. The Notice of Decision letter is incorrect in denying the applicant TPS because of the two misdemeanor convictions as one, the driving while license is suspended maximum penalty could not exceed six months, which the applicant argues falls within the penalty exception rule and should not be counted against the applicant. Thus making him eligible for TPS.

It is noted that the director did not find the applicant had been convicted of having violated any controlled substance act. Additionally, counsel argues that the applicant falls within “the penalty exception rule and should not be counted against the applicant.” Counsel does not explain the exception rule to which he is referring and submits no evidence to support his assertion. It is noted that he assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

Section 244(c) of the Act, and the related regulations at 8 C.F.R. § 244.2, provide that an applicant who is a national of a foreign state is eligible for TPS if the 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 that 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. Section 244(c)(2)(B)(i) of the Act and the regulations at 8 C.F.R. § 244.4(a).

The regulations at 8 C.F.R. § 244.1 define “felony” and “misdemeanor” as:

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 reflects the following offenses:

- (1) On November 17, 1997, the applicant was convicted of driving while his license was suspended, (Cause No. [REDACTED] a misdemeanor, by a presiding judge of the County Criminal Court At Law Number 9 of Harris County, Texas.
- (2) On November 17, 1997, the applicant was convicted of driving while intoxicated, (Cause No. [REDACTED], a misdemeanor, by a presiding judge of the County Criminal Court At Law Number 9, of Harris County, Texas.

The applicant is ineligible for TPS due to his two misdemeanor convictions detailed above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). There is no waiver available to an alien convicted of a felony or two or more misdemeanors committed in the United States. Consequently, the director's decision to deny the application is affirmed.

The record reflects that on October 8, 1997, the applicant was ordered removed from the United States by an immigration judge in Houston, Texas. His appeal to that determination was dismissed on August 28, 1998 by the Executive Office for Immigration Review.

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.