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



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FILE:



Office: VERMONT SERVICE CENTER

Date: **OCT 05 2005**

[EAC 02 032 51821]

IN RE:

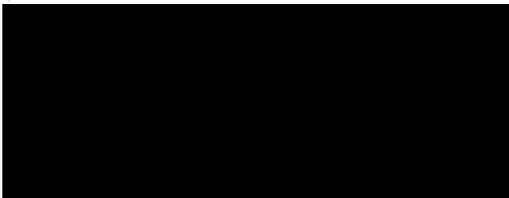
Applicant:



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 is a native and citizen of El Salvador who is applying for 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 was ineligible for TPS because he had been convicted of two or more misdemeanor offenses committed in the United States.

On appeal, counsel contends that the applicant was not convicted of two misdemeanors..

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 designated by the Attorney General 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.

- (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 conditions 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 misdemeanor.
8 C.F.R. § 244.1.

The record reveals the following offenses in New York:

1. On May 2, 1994, the applicant was arrested by the Mineola, New York police and charged with the offense: "CHARGE 1 – DRIVING WHILE INTOXICATED AUTO." Case [REDACTED]
2. On November 19, 1995, the applicant was arrested by the Mineola, New York police and charged with "oper MV 10 OF 1 PCT ALCOHOL 1ST." Case [REDACTED]

The record shows that for the offense mentioned in the above number 1, the applicant, on June 17, 1994, was convicted of VTL509.1, operating a motor vehicle without a license, and VTL1192.1, driving while ability impaired. The court imposed a fine of \$350.00 and sentenced the applicant to 20

days. The record also shows that for the offense mentioned in number 2 above, the applicant, on February 20, 1996 was convicted of VTL1192.2, operating a motor vehicle while under the influence of drug or alcohol. The court imposed a fine of \$500.00 and sentenced the applicant to 15 days and a three-year probation.

On appeal, counsel argues that the applicant's first conviction, driving while ability impaired, according to New York State Law is classified as a traffic infraction and not a misdemeanor. Counsel states that the court chose to impose a fine instead of the maximum sentence of 15 days. Counsel also states that the Service should exercise its discretion and grant the applicant a waiver of the ground of excludability and allow him an approval of TPS.

New York VTL 509 states that a violation of any provision of this section (this includes VTL 509.1) "shall be punishable by a fine of not less than fifty nor more than two hundred dollars, or by **imprisonment for not more than fifteen days**, or by both such fine and imprisonment..." Likewise, BTL 1193.1 states that driving while ability impaired (VTL 1192.1) shall be a traffic infraction and "shall be punishable by a fine of not less than three hundred dollars nor more than five hundred dollars or by **imprisonment in a penitentiary or county jail for not more than fifteen days**, or by both such fine and imprisonment." (Emphasis added.)

Consequently, for immigration purposes, VTL 509.1, VTL 1192.1, and VTL1192.2 are misdemeanors as defined in 8 C.F.R. § 244.1. The applicant is, therefore, ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on his two or more misdemeanor convictions committed in the United States. There is no waiver available to an alien found inadmissible under this section pursuant to 8 C.F.R. § 244.3(c)(1). The director's decision to deny the application will be affirmed.

Beyond the decision of the director, the record contains insufficient evidence to establish that the applicant has been continuously residing in the United States since February 13, 2001, and that he has been continuously physical present in the United States since March 9, 2001. The record merely contains: a copy of a cable bill dated August 2001; a copy of an energy bill dated May 2001; a copy of a Verizon bill dated September 2000; and a copy of a Visa card activation notice dated December 2000. The record contains no documentary evidence to sufficiently establish the applicant's day-to-day living in the United States during the requisite timeframes. The applicant has not met the continuous residence and continuous physical presence criteria described in 8 C.F.R. § 244.2 (b) and (c). Therefore, the application must also be denied for these reasons.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. An alien applying for TPS 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.