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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



OFFICE: VERMONT SERVICE CENTER

DATE: FEB 06 2006

[EAC 03 060 53946]

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:

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.


for 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 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 requested evidence to establish that he had continuously resided in the United States since February 13, 2001, and the requested court documentation relating to his criminal record.

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 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.

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 that they have continuously resided in the United States since February 13, 2001, and that they have been continuously physically present 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. Subsequent extensions of the TPS designation have been granted, with the latest extension valid until September 9, 2006, upon the applicant's re-registration during the requisite time period.

The burden of proof is upon the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by Citizenship and Immigration Services (CIS). 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet his or her burden of proof, the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. 8 C.F.R. § 244.9(b).

The first issue in this proceeding is whether the applicant has established his continuous residence in the United States since February 13, 2001, and continuous physical presence from March 9, 2001, to the date of filing the application.

The record shows that the applicant filed his TPS application on September 11, 2002. In a notice of intent to deny dated August 13, 2003, the applicant was requested to submit evidence to establish continuous residence and continuous physical presence during the requisite period. The applicant failed to respond; therefore, the director denied the application on July 15, 2004.

On appeal, the applicant asserts that he has been in the United States since June 1998, and that in 1999, he was added to his mother's asylum application. He further asserts that the criminal docket sheets indicate that he was in the United States on February 22, 2000 and on March 4, 2001. He submits copies of court documents of his arrests to support his claim.

The record also contains a letter from the applicant's mother [REDACTED] file [REDACTED] dated February 22, 1999, requesting that her Form I-589, Request for Asylum in the United States, be amended to include her son (the applicant). CIS records indicate that the applicant's name was subsequently added to Ms. [REDACTED] asylum application on July 12, 2001.

The evidence furnished by the applicant on appeal, in conjunction with other evidence included in the record of proceeding, establishes that the applicant satisfies the continuous residence and continuous physical presence requirements described in 8 C.F.R. § 244.2(b) and (c). Therefore, the applicant has overcome these findings of the director.

While it is noted that the applicant filed his TPS application on September 11, 2002, after the initial registration period for El Salvadorans (from March 9, 2001 to September 9, 2002) had closed, the record in

this case shows that the applicant qualifies for late registration as he had an application for asylum (a derivative under his mother's asylum application) that was pending during the initial registration period. 8 C.F.R. § 244.2(f)(2)(ii).

The next issue in this proceeding is whether the applicant has been convicted of any felony or two or more misdemeanors.

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.

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.

Based on the Federal Bureau of Investigation (FBI) fingerprint results report, contained in the record of proceeding, the applicant was requested on August 13, 2003, to submit the final court disposition of every charges against him, including the final dispositions of the charges listed in the FBI report. The applicant failed to respond; therefore, the director denied the application on July 15, 2004.

On appeal, the applicant submits court documents of his arrests.

The record reveals the following:

- (1) On February 23, 2000, in the Worcester District Court, Massachusetts, Docket No. [REDACTED] (arrest date February 22, 2000), the applicant was indicted for Count 1, unlicensed operation of a motor vehicle, c90 §10; and Count 2, marked lanes violation, c89 §4A. The charges were subsequently dismissed on February 23, 2000.

- (2) On March 5, 2001, in the Worcester District Court, Massachusetts, Docket No. [REDACTED] (arrest date March 4, 2001), the applicant was indicted for "94C/34/C DRUG, POSSESS CLASS B c94C §34." It is noted that the Criminal Docket was altered. The docket shows that the applicant entered a plea of guilty; however, the date of the plea was altered and the "disposition date" of March 7, 2001, was covered over and replaced by a new date of August 21, 2002. The "Sentence or Other Disposition" was also altered. The applicant was ordered to pay \$500 in court costs, with a notation that the case is to be dismissed if \$500 is paid. It is noted that additional assessment was imposed requiring the applicant to pay legal counsel fee in the amount of \$100 or 20 hours of community service. On August 21, 2002, the case was "Dismissed on recommendation of Probation Dept."
- (3) The Federal Bureau of Investigation fingerprint results report shows that on May 26, 2001, in Worcester, Massachusetts, the applicant (name used: Ricardo Lopez) was arrested for Count 1, "090:024:24A.1 OPERATE MV RECKLESSLY/NEGLIGENTLY, ENDAN;" and Count 2, "90/10/A UNLICENSED OPERATION OF MV C90 S10." The final court disposition of this arrest is not contained in the record of proceeding.
- (4) On July 5, 2001, in the Worcester District Court, Massachusetts, Docket No. [REDACTED] (arrest date July 5, 2001), the applicant was indicted for unlicensed operation of a motor vehicle, c90 §10. On September 4, 2001, the applicant entered a plea of guilty, and he was ordered to pay \$85 in fines and costs. On January 2, 2002, the case was "Dismissed on recommendation of Probation Dept."
- (5) On November 5, 2001, in the Worcester District Court, Massachusetts, Docket No. [REDACTED] (arrest date November 4, 2001), the applicant was indicted for "268/34A FALSE NAME/SSN, ARRESTEE FURNISH c268 §34." On February 22, 2002, the charge was dismissed for lack of evidence.
- (6) On November 5, 2001, in the Worcester District Court, Massachusetts, Docket No. [REDACTED] (arrest date November 4, 2001), the applicant was indicted for Count 1, "90/10/A UNLICENSED OPERATION OF MV C90 §10;" and Count 2, "90/25A IDENTIFY SELF, MV OPERATOR REFUSE C90 §25." On February 22, 2002, the charges were dismissed for lack of evidence as to both counts.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines the term "conviction:"

(48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where --

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The record in Nos. 2 and 4 above shows that the applicant entered a plea of guilty to possession of a controlled substance and unlicensed operation of a motor vehicle, both misdemeanor offenses, and that the judge ordered some form of punishment; in this case, \$500 in court costs and \$100 legal counsel fee or 20 hours of community service as to No. 2 above, and \$85 in fines and costs as to No. 4 above. Therefore, the applicant was convicted of these offenses.

The record indicates that Nos. 2 and 4 were dismissed based on recommendations of the Probation Department. 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, 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 Nos. 2 and 4 above despite the dismissal of the convictions.

The applicant is ineligible for TPS due to his two misdemeanor convictions, and because he is inadmissible to the United States, pursuant to section 212(a)(2)(A)(i)(II) of the Act, based on his drug-related conviction. Sections 244(c)(2)(B)(i) and 244(c)(1)(A)(iii) of the Act. Additionally, the applicant has failed to provide the final court disposition of his arrest detailed in No. 3 above. 8 C.F.R. § 244.9(a). Consequently, the director's decision to deny the application will be affirmed.

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 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.