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

M1

FILE:



OFFICE: SEATTLE (SPOKANE)

DATE: **JUN 07 2006**

IN RE:

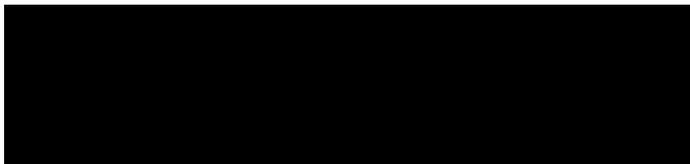
Applicant:



APPLICATION:

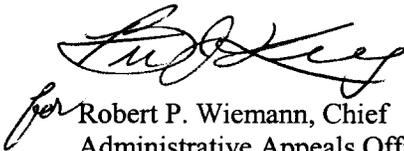
Application for Temporary Protected Status under Section 244 of the Immigration and Nationality Act, 8 U.S.C. § 1254

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.


for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Seattle, Washington, 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 district director denied the application because the applicant had been convicted of at least three misdemeanors committed in the United States.

On appeal, counsel 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.

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) The Federal Bureau of Investigation (FBI) fingerprint results report indicates that on August 20, 1994, the applicant was arrested for Count 1, driving while intoxicated; and Count 2, driving while license suspended. On September 5, 1995, in the Walla Walla District Court, Washington, Case No. [REDACTED] the applicant was convicted of driving under the influence, RCW 46.61.502, a gross misdemeanor (Count 1). He was fined \$525. The final court disposition as to Count 2 is not contained in the record.
- (2) The FBI report indicates that on November 16, 1994, in Walla Walla, Washington, the applicant was arrested for Count 1, driving while intoxicated; Count 2, driving while license suspended-2nd offense; and Count 3, failure to stop & identify after collision. The final court disposition of this arrest is not contained in the record.
- (3) The district director noted that the applicant was also arrested on October 24, 1997, by the Columbia County Sheriff's Office, Washington, for driving under the influence, under Case [REDACTED]. The final court disposition of this arrest is not contained in the record.
- (4) On August 17, 1998, in the Walla Walla District Court, Washington, Case [REDACTED] (arrest date July 29, 1998), the applicant was convicted of driving while license suspended in the 3rd degree, RCW 46.20.342.3, a misdemeanor. He was fined \$300.
- (5) On February 26, 2001, in the Walla Walla District Court, Washington, Case [REDACTED] (arrest date August 6, 2000), the applicant was convicted of driving while license suspended in the 3rd degree, RCW 46.20.342.1C, a misdemeanor. He was sentenced to serve 15 days in jail, and fined \$500.

On appeal, counsel asserts that the applicant never had a license, and thus was not ever subject to the misdemeanor conviction of driving with suspended license. He states that the applicant took his case back to the District Court to inquire as to his criminal record, at which time the District Judge ordered that his guilty

plea be withdrawn and his convictions be vacated. Counsel submits copies of orders of the District Court, Walla Walla County, Washington, relating to Case [REDACTED] above] and Case [REDACTED] [No. (5) above], both dated September 8, 2003, ordering: "Pursuant to the authority of RCW 9.96.060, upon oral request of the defendant, this charge, driving while suspended third, is hereby dismissed after entry of a not guilty plea and the record is vacated."

The court, in this case, did not vacate the conviction based on a defect in the conviction or in the proceedings underlying the conviction. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Rather, the court dismissed the convictions pursuant to RCW 9.96.060 which states, in part:

(1) Every person convicted of a misdemeanor or gross misdemeanor offense who has completed all of the terms of the sentence for the misdemeanor or gross misdemeanor offense may apply to the sentencing court for a vacation of the applicant's record of conviction for the offense. If the court finds the applicant meets the tests prescribed in subsection (2) of this section, the court may in its discretion vacate the record of conviction by: (a)(i) Permitting the applicant to withdraw the applicant's plea of guilty and to enter a plea of not guilty; or (ii) if the applicant has been convicted after a plea of not guilty, the court setting aside the verdict of guilty; and (b) the court dismissing the information, indictment, complaint, or citation against the applicant and vacating the judgment and sentence.

Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under state law. State rehabilitative actions that do not vacate a conviction on the merits are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Therefore, despite the dismissals of the convictions, the applicant remains convicted, for immigration purposes, of the two misdemeanors detailed in Nos. 4 and 5 above.

The applicant is ineligible for TPS due to his record of at least three misdemeanors, detailed in Nos. 1, 4, and 5 above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the district director's decision to deny the application for this reason will be affirmed.

In removal proceedings held on June 1, 1993, in Denver, Colorado, an Immigration Judge granted the applicant voluntary departure from the United States to El Salvador on or before November 28, 1993. There is no evidence in the record that the applicant departed from the United States as required.

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.