

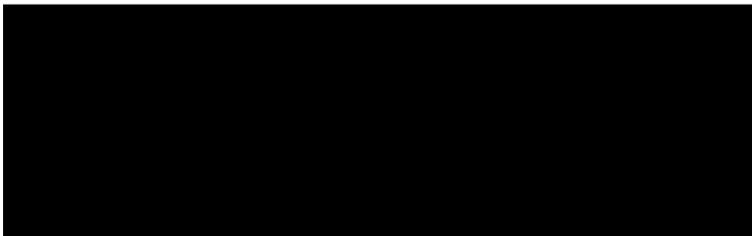


U.S. Citizenship
and Immigration
Services

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FILE:



OFFICE: VERMONT SERVICE CENTER

DATE: MAR 20 2006

[EAC 02 244 51077]

IN RE:

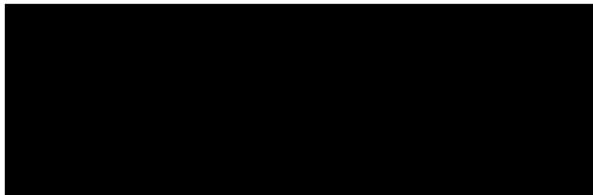
Applicant:



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 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 respond to a request to submit: (1) evidence to show that he had continuously resided in the United States since February 13, 2001; (2) evidence to show that he had been continuously physically present from March 9, 2001, to the date of filing the application; (3) an Application for Waiver of Grounds of Excludability (Form I-601); and (4) the final court disposition of every charge against him, including his arrests listed in the Federal Bureau of Investigation (FBI) fingerprint results report.

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 alien who is a national of a foreign state designated by the Attorney General is eligible for temporary protected status only if such alien establishes that he or she:

- (a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign 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 § 244.3;
- (e) Is not ineligible under 8 C.F.R. § 244.4; and
- (f)
 - (1) Registers for TPS 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 TPS application.

The record shows that the applicant filed his TPS application on July 19, 2002. In a notice of intent to deny dated July 1, 2004, the applicant was requested to submit evidence establishing his qualifying continuous residence and continuous physical presence in the United States during the requisite period. The applicant failed to respond; therefore, the director denied the application on September 27, 2004.

On appeal, counsel asserts that the applicant entered the United States without inspection in February 1985 and has not left the United States. He submits:

1. A copy of a State of Virginia Identification Card issued to the applicant on June 12, 2000.
2. Copies of earnings statements and payroll checks issued to the applicant by [REDACTED] dated March 22, 2001, and April 25, 2001.
3. A letter dated September 30, 2004, from [REDACTED] verifying the applicant's medical information and medical appointments effective between 2001 and 2002, and that the applicant is a current patient at this clinic where he receives medical and social services.

4. A copy of a letter dated September 3, 2002, from T [REDACTED] indicating that the applicant was seen at the Center on September 3, 2002. The letter further indicates that the applicant has been HIV (human immunodeficiency virus) positive since 1987.
5. Copies of laboratory reports for tests administered on June 11, 2001; August 18, 2001; August 6, 2002; September 6, 2002; and September 27, 2002.

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

The second issue in this proceeding is whether the applicant is inadmissible to the United States pursuant to section 212(a)(1)(A)(i) of the Act.

The director noted that the applicant indicated on his TPS application (Part 4, 2j) that he is afflicted with a communicable disease of public health significance. In a notice of intent to deny dated July 1, 2004, the applicant was advised that the TPS application would be denied unless he could show that he was eligible for a waiver, and that he must file an Application for Waiver of Grounds of Excludability, Form I-601. The applicant failed to respond; therefore, the director denied the application on September 27, 2004.

Section 212(a)(1)(A)(i) of the Act states, in part:

Any alien who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome,

is inadmissible to the United States. HIV has been determined by the Public Health Service to be a communicable disease of public health significance. 42 C.F.R. § 34.2(b)(4). Aliens infected with HIV, however, upon meeting certain conditions, may have such inadmissibility waived.

On appeal, counsel asserts that the applicant qualifies for a humanitarian waiver of the HIV ground of inadmissibility. He states that the applicant's health would be certain to decline if he were to return to El Salvador because, due to the country's poverty, El Salvador lacks adequate medical treatment and facilities for people suffering from HIV disease. Counsel further asserts that there is no danger to the public health and no risk of transmission created by the applicant's presence in the United States, and that the applicant receives medical care for HIV at no cost to the government.

The record of proceeding contains a Form I-601 waiver filed by the applicant on October 26, 2004. The Form I-601 waiver was approved by the Service Center on April 26, 2005. Therefore, the applicant also has overcome this portion of the director's decision.

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

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.

In a notice of intent to deny dated July 1, 2004, the applicant was requested to submit the final court disposition of every charges against him, including the charges listed on the FBI report. The applicant failed to respond; therefore, the director denied the application on September 27, 2004:

On appeal, counsel submits court documents relating to the applicant’s arrests:

- (1) The FBI report shows that the applicant was arrested on May 9, 1988, in Houston, Texas, for criminal mischief. The applicant, on appeal, submits a letter dated September 24, 2004, from the City of Houston, Municipal Courts Administration Department, indicating: “UNABLE TO LOCATE FROM IT HAS BEEN PURGED FROM OUR SYSTEM.” It is noted that the only information used by the court to search their records is the applicant’s name. There is no evidence that the arrest information, such as, the date and place of arrest and offense, including the applicant’s date of birth and other pertinent information, were used for the search. Furthermore, the purging of court records is not evidence that the applicant was not convicted of the offense.
- (2) On April 17, 1989, in the District Court of Maryland for Prince George’s County, Case No. [REDACTED] (arrest date April 14, 1989), the applicant was convicted of Count 1, disorderly conduct-public place, a misdemeanor; and Count 2, malicious destruction-property of another, a misdemeanor. He was sentenced to serve 3 days in jail as to Count 1; he was sentenced to serve 3 days in jail as to Count 2.

The applicant is ineligible for TPS due to his record of at least two misdemeanor convictions, detailed above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the application will be affirmed.

The record shows that the applicant was removed from the United States to El Salvador on December 24, 1985, based on the final order of removal by the Immigration Judge on December 16, 1985, at Laredo, Texas. Additionally, the FBI report indicates that the applicant (name used: [REDACTED]) was

apprehended by the Border Patrol near McAllen, Texas, on February 13, 1986, and placed in removal proceedings.

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.