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U.S. Department of Homeland Security
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U.S. Citizenship
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FILE:



Office: VERMONT SERVICE CENTER

Date: OCT 18 2006

[EAC 05 141 72523 as it pertains to EAC 03 038 51013]

IN RE:

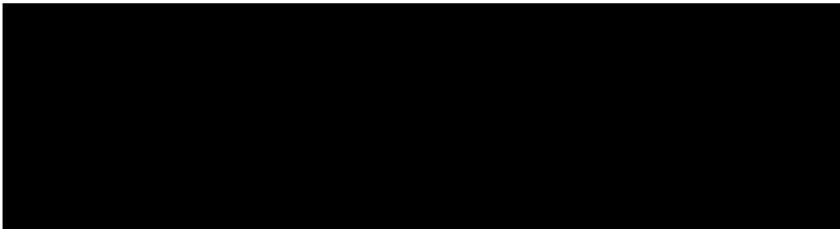
Applicant:



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.

Cindy M. Gomez
Robert P. Wiemann, Chief
Administrative Appeals Office *207*

DISCUSSION: The applicant's Temporary Protected Status (TPS) was withdrawn by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who was granted TPS on September 10, 2003. On September 1, 2005, the director sent the applicant a notice that he intended to withdraw his TPS status if he did not forward final court dispositions for two arrests. After receiving no response, the director withdrew the applicant's status on July 27, 2006, when it was determined that he had been convicted of two or more misdemeanors committed in the United States.

The director may withdraw the status of an alien granted TPS at any time if it is found that the alien was not in fact eligible at the time such status was granted, or at any time thereafter becomes ineligible for such status. Section 244(c)(3)(A) of the Act and 8 C.F.R. § 244.14(a)(1).

On appeal, counsel argues that the applicant is eligible to reapply for TPS once an administrative denial is issued by the Vermont Service Center and that there is significant case law which clearly defines a single scheme of criminal conduct. Counsel argues that the applicant should not be ineligible for his two misdemeanor convictions in 2002 because they fell under a single scheme and should be treated as one misdemeanor for immigration purposes citing Section 212(a)(2)(B) of the INA which specifies waivers of inadmissibility for general classes of aliens ineligible to receive immigrant visas and admission to the United States because of multiple criminal convictions.

Counsel's argument that the applicant is eligible for the waiver provisions of Section 212(a)(2)(B) of the INA is without merit because Section 244(c)(2)(A)(iii)(I) of the INA specifies that when determining an alien's admissibility for TPS purposes, Citizenship and Immigration Services may not apply the waiver provisions of Section 212(a)(2)(B) as it relates to criminals. It is noted that counsel does not identify the misdemeanor convictions that he is referring to in his brief.

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 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 criminal information:

(1) The applicant's Federal Bureau of Investigation fingerprint results report shows that:

(a) on March 17, 2003, in Chelsea, Massachusetts, he was arrested for assault with a dangerous weapon;

(b) on June 15, 2003, in Lynn, Massachusetts, he was arrested for assault with a dangerous weapon; and,

(c) on March 9, 2006, in Lynn, Massachusetts, he was arrested on a "straight warrant."

(2) The applicant's report from the Commonwealth of Massachusetts Criminal History Systems Board shows that on June 17, 2003, in Lynn District Court he was arraigned for:

(a) assault with a dangerous weapon; and,

(b) disorderly conduct.

He was convicted of those charges on November 7, 2003. Final disposition documentation for these two arrests has not been provided by the applicant.

(3) On September 3, 2003, a Judge of the Chelsea District Court in Chelsea, Massachusetts, found the applicant guilty of:

(a) the destruction of property, a misdemeanor;

(b) intimidation of a witness, a misdemeanor; and,

(c) assault with a dangerous weapon, a misdemeanor.

(4) On December 10, 2003, a Judge of the Chelsea District Court in Chelsea, Massachusetts, found the applicant guilty of:

(a) "affray" [Fighting together of two or more persons in a public place to the terror of the persons lawfully there], a misdemeanor; and,

(b) of carrying a dangerous weapon, a misdemeanor.

It is noted that counsel states that on December 10, 2003, one count of assault with a dangerous weapon and one count of disorderly conduct by the applicant were fully dismissed. Additionally, counsel states that on July 6, 2006, one count of assault with a dangerous weapon and one count of intimidation of a witness by the applicant were dismissed on appeal. Counsel submits no evidence to support these assertions. It is noted that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

Further, it is noted that 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 convictions under state law in some cases, an applicant remains convicted for immigration purposes.

Pursuant to section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101((a)(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 applicant pled guilty to the five crimes listed in numbers (3) and (4) above. The Judges who convicted him ordered punishment by restraining his liberty as they sentenced him to be on probation for one year for each conviction. It is determined that he is ineligible for TPS due to his five misdemeanor convictions. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to withdraw the applicant's TPS will be affirmed.

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.