

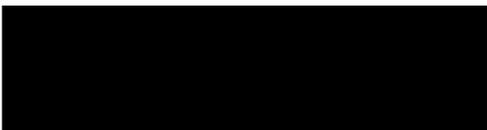
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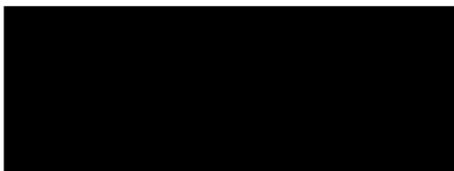
OFFICE: Vermont Service Center

DATE: DEC 28 2007

IN RE: Applicant: [REDACTED]

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.

*John H. Vaughan*  
for  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the Director, Vermont Service Center (VSC). The application is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant claims to be 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 he determined that the applicant was ineligible for TPS because the applicant had been convicted of two misdemeanor offenses committed in the United States.

On appeal, counsel asserts the applicant's eligibility for TPS and provides some final court dispositions regarding the applicant's past arrests.

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.
- (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" as follows:

*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.

Along with his application for TPS filed on August 30, 2006, the applicant provided certified case histories from the Warren District Court of the Commonwealth of Kentucky reflecting that the applicant was convicted of reckless driving, a misdemeanor, on December 4, 2003; and operating a motor vehicle under the influence of alcohol or drugs, also a misdemeanor, on June 22, 2005. The director determined that the applicant was ineligible for TPS because he had committed two misdemeanors within the United States. Therefore, the director denied the application on April 19, 2007.

On appeal, counsel asserts that the applicant is eligible for TPS because the charge of "Reckless Driving" is a violation, not a misdemeanor as defined by Federal Law.

Counsel also provides copies of the court proceedings and final dispositions for the following arrests:

- (1) On December 4, 2003, the applicant pled guilty to "Reckless Driving," a misdemeanor offense according to the court docket,<sup>1</sup> and;
- (2) On June 22, 2005, the applicant pled guilty to "Op MV Under/Influence of Alcohol/Drugs, etc. .08 1<sup>st</sup> Offense," a misdemeanor.

In addition to the above convictions, a review of the record of proceedings shows that the applicant has had other arrests and convictions since 1993. On May 18, 1996, the applicant evidently pled guilty to another misdemeanor charge of operating a motor vehicle under the influence of alcohol or drugs, though there is no final court disposition in the record. Thus, the record does not support counsel's assertion that the applicant has only been convicted of a single misdemeanor in the United States. The applicant has not established his eligibility for TPS in accordance with section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Therefore, the director's decision to deny the application for TPS on this ground is affirmed.

Beyond the decision of the director, it is noted that the applicant has provided insufficient evidence to establish that he is a national or citizen of El Salvador. 8 C.F.R. § 244.9, states that each application for TPS must be accompanied by evidence of the applicant's identity and nationality.

Sec. 244.9 Evidence.

(a) *Documentation.* Applicants shall submit all documentation as required in the instructions or requested by the Service. The Service may require proof of unsuccessful efforts to obtain documents claimed to be unavailable. If any required document is unavailable, an affidavit or other credible evidence may be submitted.

(1) *Evidence of identity and nationality.* Each application must be accompanied by evidence of the applicant's identity and nationality, if available. If these documents are unavailable, the applicant shall file an affidavit showing proof of unsuccessful efforts to obtain such identity documents, explaining why the consular process is unavailable, and affirming that he or she is a national of the designated foreign state. A personal interview before an immigration officer shall be required for each applicant who fails to provide documentary proof of identity or nationality. During this interview, the applicant may present any secondary evidence that he or she feels would be helpful in showing nationality. Acceptable evidence in descending order of preference may consist of:

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<sup>1</sup> Counsel argues that the Reckless Driving offense (Kentucky Revised Statute (KRS) 189.290) is a "violation", not a misdemeanor as defined by Federal Law. According to KRS 189.990, a violation of KRS 189.290 carries a fine of not less than twenty dollars, but not more than one hundred dollars. This conviction is not considered a "misdemeanor" under 8 C.F.R. § 244.1, because it does not carry a term of imprisonment of more than five days.

- (i) Passport;
- (ii) Birth certificate accompanied by photo identification;  
and/or
- (iii) Any national identity document from the alien's country of  
origin bearing photo and/or fingerprint.

The applicant has provided a copy of his birth certificate along with an English translation. He has not, however, provided photo identification as specified in 8 C.F.R. § 244.2(a)(1). Therefore, the application will also be denied for this reason.

Furthermore, the record shows that the applicant filed his application for TPS four years after the initial registration period for El Salvadoran nationals had closed on September 9, 2002.

To qualify for late registration as described in 8 C.F.R. § 244.2(f)(2) and (g), the applicant must provide evidence that during the initial registration period he or she was either (i) was a nonimmigrant or had been granted voluntary departure status or any relief from removal, (ii) had an application for change of status, asylum, voluntary departure, or any relief from removal which was pending or subject to further review or appeal, (iii) had a pending request for reparable, or (iv) was a spouse or child of an alien currently eligible to be a TPS registrant; and that he or she had filed an application for late registration within 60 days of the expiration or termination of the foregoing condition.

The applicant filed an application for asylum in 1994, which was terminated by a decision of the Board of Immigration Appeals (BIA), on November 17, 2005, affirming an Immigration Judge's denial of that application the previous year. While the asylum application met the late registration criterion of 8 C.F.R. § 244.2(f)(2)(ii), the TPS application had to be filed by January 16, 2007, to meet the 60-day deadline for late registration prescribed by 8 C.F.R. § 244.2(g). Since the applicant did not file for TPS until August 30, 2006 – more than nine months after the termination of the asylum application – he is not eligible for late TPS registration. Accordingly, the application will also be denied for this reason.

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 that burden.

It is noted that the applicant is subject to a removal order issued by an Immigration Judge in Memphis, Tennessee, on September 7, 2004, which was affirmed by the BIA on November 17, 2005.

**ORDER:** The appeal is dismissed.