



U.S. Citizenship
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FILE: [REDACTED]
[EAC 01 168 50621]

OFFICE: VERMONT SERVICE CENTER

DATE: **DEC 31 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:

[REDACTED]

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, withdrew approval of the applicant's Temporary Protected Status (TPS) application. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant claims to be a native and citizen of El Salvador who is seeking TPS under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director withdrew approval of TPS because the applicant has been convicted of at least two misdemeanors.

The director may withdraw the status of an alien granted TPS under section 244 of the Act at any time if it is determined 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. 8 C.F.R. § 244.14(a)(1).

On appeal, counsel states that the applicant did not receive the director's June 30, 2006 request for evidence and submits the requested documentation regarding the applicant's criminal convictions.

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).

The regulation at 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.

Any alien convicted of two or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were five years or more is inadmissible. Section 212(a)(2)(B) of the Act.

The record reveals the following offenses:

1. On November 25, 2002, the applicant was charged with a misdemeanor violation of Massachusetts General Law, c. 90, §24, driving under the influence of intoxicating liquor, c.89, §9, failure to stop or yield, and c.89, §1, failure to keep right for oncoming motor vehicles. The charge of driving under the influence of intoxicating liquor was continued without a guilty finding until February 24, 2004. The applicant's license was suspended for 45 days and he was ordered into an alcohol treatment program. The criminal docket indicates that the sentences on the remaining charges were "filed with the defendant's consent." On January 9, 2004, the applicant was found in violation of his probation and he was found guilty and ordered to pay a \$200 fine.
2. On April 27, 2006, the applicant was convicted in the Recorder's Court of Gwinnett County, Georgia, of two misdemeanor violations of Georgia Code 40-6-391, driving under the influence of alcohol. He received a \$1,000 fine for each count. The applicant was also ordered to serve a period of 24 months confinement, but was allowed to serve the sentence on probation. Probation included 30 days of a "Work Alternative Program" and 60 days of a "Work Release Program."

On appeal, counsel asserts that none of the offenses for which the applicant was convicted was punishable by a term of more than ten days. Counsel also asserts that the final disposition of the applicant's conviction in Massachusetts was a February 27, 2007 continuance without a guilty finding.

The evidence of record, however, does not support counsel's assertions. According to the documentation submitted on appeal, the Worcester (Massachusetts) District Court continued the applicant's case without a finding of guilty until February 24, 2004. However, on January 9, 2004, a finding of guilty was entered after a finding that the applicant had violated probation. The documentation submitted does not indicate that the court took any action on February 27, 2007, as counsel asserts. Furthermore, Massachusetts General Law c.90, §24 (1)(a)(1) provides that punishment for a first offense of driving under the influence of intoxicating liquor includes imprisonment for not more than two and one-half years. While subsection (a)(4) permits the sentencing court to place a defendant on probation, such probation includes at least 14 days "confinement" in a residential treatment program. Accordingly, because the offense was punishable by confinement in excess of five days, the applicant was convicted of a misdemeanor for immigration purposes. *See* 8 C.F.R. § 244.1.

The record also reflects that the applicant was sentenced to 24 months (one year for each offense) for violations of Georgia Code 40-6-391. While the applicant was permitted to serve his sentence as probation, it does not mitigate the fact that he was sentenced to more than five days in jail.

The applicant is therefore ineligible for TPS due his conviction of two or more misdemeanors as 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 withdraw approval of the application for this reason 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.



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ORDER: The appeal is dismissed.