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FILE: [REDACTED] OFFICE: Vermont Service Center DATE: JUL 19 2007  
[REDACTED] consolidated herein]  
[EAC 01 157 50117]

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

The applicant is a 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 application was denied by the director on July 10, 2003, on the ground that the applicant failed to provide the final court disposition of an arrest in 1986 for conspiracy to smuggle aliens into the United States.

On appeal, counsel contends that court records do not reveal that the applicant was ever convicted of a crime and the applicant asserts that he was never arrested.

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.

El Salvadoran nationals applying for TPS must demonstrate continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. The initial registration period for El Salvadorans was from March 9, 2001, through September 9, 2002.

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 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 CIS. See 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. See 8 C.F.R. § 244.9(b).

The record shows that the applicant filed his initial Form I-821, Application for Temporary Protected Status, during the initial registration period for El Salvadoran nationals on March 22, 2001. On January 29, 2002, the director sent a notice to counsel advising that a criminal history check based on the applicant's fingerprints revealed that the applicant was arrested on September 13, 1986, by United States Marshals and charged with alien

smuggling. The applicant was directed to provide the final court disposition of every charge against him and, for any conviction(s), evidence of whether the crime was a felony or a misdemeanor. Counsel responded by letter dated April 22, 2002, asserting that he had tried to obtain a disposition of the arrest from the federal court in Houston, Texas, but was told that the case had been sent to the National Archives and Record Administration (NARA) in Fort Worth, Texas. Counsel states that he sent two requests to NARA for certified copies of the final dispositions of the applicant's arrest, but each time received an answer from NARA indicating that the name on the case does not match the name requested. Counsel submitted photocopies of the two form responses from NARA. Counsel also stated that the applicant was not aware of any criminal charges against him or of any criminal convictions.

On July 10, 2003, the director denied the application on the ground that the documentation submitted by counsel in April 2002 did not comply with the request for the final court disposition of the applicant's arrest.

On appeal counsel states that "[b]ased on the information obtained under a FOIA [Freedom of Information Act] request, an exhaustive search of court records was made and the court has told us that no such record [of an arrest and conviction of the applicant] can be found." According to counsel, "[t]he applicant insists that while a number of people who entered [the United States] with him were arrest for smuggling – he was not arrested." Counsel concludes that the applicant has met his burden of proof. The AAO does not agree.

The applicant's assertion that he was never arrested is contradicted by the evidence of record, which includes a criminal complaint filed on September 15, 1986, against the applicant and seven other named individuals by the U.S. Immigration and Naturalization Service (INS) [now U.S. Citizenship and Immigration Services (CIS)] in the U.S. District Court in Houston, Texas. The complaint indicates that the applicant was charged with the offense of smuggling illegal aliens into the United States on September 13, 1986, in violation of Title 19, United States Code, section 371 ("Conspiracy to Commit Offense or to Defraud the United States").<sup>1</sup> Though counsel asserts that the court told him that no records pertaining to the applicant could be found, counsel has not provided any written statement to that effect from the U.S. District Court in Houston. Unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, the case file names and case numbers given by counsel to NARA in April 2002, do not match those of the District Court case against the applicant in 1986. Whereas counsel requested information about the case file of USA v. Martinez, case file no. 86 CR 200, the complaint against the applicant in U.S. District Court identified the case number as [REDACTED] and did not name [REDACTED] as a defendant (though a [REDACTED] is named in other documentation as one of the defendants and a ringleader of the smuggling operation). According to NARA's second response to counsel, dated April 19, 2002, the case file no. [REDACTED] relates to the entirely unrelated case of USA v. Maass Flange Corporation.

Thus, the documentation in the record confirms that the applicant was arrested in Houston, Texas, on September 13, 1986, and charged in U.S. District Court with alien smuggling. The applicant has not submitted the final court disposition of that arrest. Accordingly, the applicant has failed to establish his

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<sup>1</sup> A violation of this Code section may be punishable by up to five years imprisonment, depending on the nature of the underlying offense.

eligibility for TPS in accordance with section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). The director's decision denying the application will therefore be affirmed.<sup>2</sup>

The AAO notes that a Warrant of Deportation was issued by the INS (now CIS) District Director in Houston, Texas, on April 9, 1987, and that the applicant was subsequently removed from the United States on three separate occasions: April 13, 1987; February 16, 1990; and November 27, 1990.

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 that burden.

**ORDER:** The appeal is dismissed.

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<sup>2</sup> The AAO notes that the applicant filed another TPS application on May 3, 2005, identified as an application for re-registration or renewal of TPS, which was approved by the Vermont Service Center on August 15, 2005.