



U.S. Citizenship
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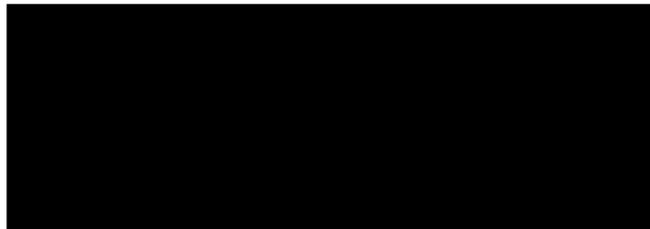
OFFICE: TEXAS SERVICE CENTER

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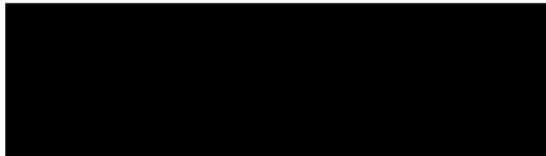
IN RE:

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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Texas Service Center. The application 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 she found the applicant ineligible for TPS due to his convictions for two misdemeanors.

On appeal, counsel for the applicant submits a statement.

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).

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 offenses:

- 1) On November 12, 1989, the applicant, under the name of Juan Antonio Gasilla, was arrested by the Police Department, Houston, Texas, and charged with "SHOPLIFTING MISD;"
- 2) On October 11, 1998, the applicant was charged with "CRIMINAL TRESPASS-HABITATION."

In response to the request for additional evidence relating to the charges, counsel for the applicant submitted a Certificate of Disposition from the Harris County District Clerk, Texas, reflecting the disposition of "guilty" dated December 18, 1998, to the charge of "CRIMINAL TRESPASS-HABITATION," a Class A Misdemeanor, and the disposition of "guilty" dated November 14, 1989, to the charge of "THEFT \$20-\$200," a Class B Misdemeanor.

On appeal, filed on February 20, 2004, counsel for the applicant asserts that:

The Applicant pled guilty to two misdemeanor charges without knowing the full consequences of his plea. Therefore, the applicant's pleas were unconstitutional, and he will be reopening both misdemeanor cases in order to withdraw his pleas. Once the cases are reopened, the Applicant will not have any convictions and will be eligible for his TPS. Wherefore, the Applicant's guilty pleas were unconstitutional and by denying the applicant TPS he will be denied his constitutional rights under the Due Process clause.

To date, counsel has not submitted any additional evidence in support of the appeal.

The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988). The record does not contain any evidence indicating that the criminal matters have been reopened and overturned on constitutional grounds. Moreover, 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).

The court records clearly show that the applicant was convicted of two misdemeanor charges as discussed above. Citizenship and Immigration Services (CIS) is required to rely on the court record as it stands, and cannot make determinations of guilt or innocence based on that record. Furthermore, CIS may only look to the judicial records to determine whether the person has been convicted of the crime, and may not look behind the conviction to reach an independent determination concerning guilt or innocence. *Pablo v. INS*, 72 F.3d 110, 113 (9th Cir. 1995); *Gouveia v. INS*, 980 F.2d 814, 817 (1st Cir. 1992); and *Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991).

The applicant is ineligible for TPS, under 8 C.F.R. § 244.4(a), due to his record of two misdemeanor convictions, detailed above. Consequently, the director's decision to deny the application for this reason will be affirmed.

It is further noted that the applicant's record of proceedings under A91 403 096, contains the Order of the Immigration Judge, Houston, Texas, dated December 21, 2001, in which the applicant's application for cancellation of removal was denied, and he was granted voluntary departure to be effected on or before February 19, 2002, with an alternate order of removal to El Salvador. Through counsel, the applicant filed an appeal that was dismissed by the Board of Immigration Appeals (BIA) on October 31, 2003. The BIA order permitted the applicant 30 days from the date of the order to voluntarily depart the United States, or be removed pursuant to the order of the Immigration Judge. Through counsel, the applicant petitioned the United States Court of Appeals for the Fifth Circuit to review the October 31, 2003, decision of the BIA. This petition was dismissed by the United States Court of Appeals for the Fifth Circuit on February 20, 2004, pursuant to counsel's motion to withdraw the petition on the basis that the applicant was eligible for late initial registration for TPS, and sought to pursue TPS in lieu of the petition for relief from removal before the court. As discussed above, the applicant, in fact, is not eligible for TPS due to his conviction of two misdemeanor charges.

The record contains a Warrant of Removal/Deportation issued on March 8, 2004, at Houston, Texas, following the final order by the Circuit Court.

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.