



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date: **SEP 10 2007**

[EAC 01 202 54017]

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 Vermont Service Center. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (VSC), withdrew the approval of the application. The application 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 seeks Temporary Protected Status (TPS) under section 244 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1254.

The director withdrew the approval of the application because the applicant failed to submit the final disposition of the applicant's potentially disqualifying arrest for a criminal felony.

On appeal, counsel for the applicant submits the final disposition and asserts that the applicant is eligible for TPS because the applicant's conviction is not considered an aggravated felony under section 101(a)(43)(G) of the Act.

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 designated by the Attorney General 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 TPS 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 the regulations at 8 C.F.R. § 244.4(a).

The regulations at 8 C.F.R. § 244.1 define “felony” and “misdemeanor” as:

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 on 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 Citizenship and Immigration Services (CIS). 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. 8 C.F.R. § 244.9(b).

On March 1, 2006, the director informed the applicant that his criminal history check reflected an arrest on December 23, 2001, in Mineola, New York, for Robbery in the 2nd Degree under New York PL § 160.10. The applicant did not respond to the director’s request to submit a final disposition of all the charges against him. On June 30, 2006, the director withdrew the approval of the applicant’ TPS application.

On appeal, counsel asserts that the applicant was not convicted of an aggravated felony under § 101(a)(43)(G) of the Act because he was only sentenced to time served, not to more than one year imprisonment. Counsel submits the final disposition of the arrest in question.

The record reflects that on June 21, 2002, the applicant was convicted in Nassau County Court, in Nassau County, New York, of Attempted Robbery in the 2nd Degree under PL 110-160.10. Attempted Robbery in the 2nd Degree under PL 110-160.10 is classified under the New York law as a violent Class D felony. The

sentence for a term of imprisonment for a violent Class D felony must be at least two years and no more than seven years. A judge can make an exception to this sentence requirement if mitigating circumstances exist.

Counsel erroneously refers to a section of the Act that is not applicable to the applicant in these proceedings. Section 101(a)(43) of the Act defines aggravated felonies for purposes of determining classes of deportable aliens under § 237(a)(2)(A)(iii). Section 101(a)(43)(G) classifies a theft or burglary offense as an aggravated felony if the sentence imposed was for imprisonment of at least one year.

In determining whether the applicant is eligible for TPS, we look to § 244(c)(2)(B)(i) of the Act, not to § 101(a)(43)(G) of the Act. These sections are distinguishable, in that § 101(a)(43)(G) takes into account the actual sentence imposed, while § 244(c)(2)(B)(i) is only concerned with the maximum possible penalty for the crime.

The regulations at 8 C.F.R. § 244.1 define a felony as a crime punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served. In the applicant's case, he was convicted of a crime punishable by imprisonment between two to seven years. For purposes of TPS eligibility, the applicant has been convicted of a felony, regardless of the fact that the judge in his case only sentenced him to time served.

Pursuant to § 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a), the applicant is ineligible for TPS due to his felony conviction. Consequently, the director's decision to withdraw approval of the application is 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.