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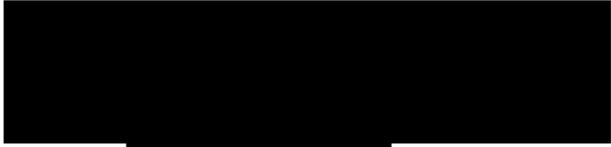
U.S. Department of Homeland Security
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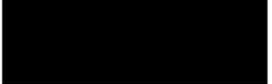
U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: FEB 29 2008

[EAC 02 259 51572]

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 Director, Vermont Service Center (VSC) denied the application. The matter is now appeal before the Administrative Appeals Office (AAO). 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 denied the application because the applicant had been convicted of two or more misdemeanors.

On appeal, the applicant asserts that his convictions were for traffic offenses that do not affect his eligibility for TPS.

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 as designated by the Attorney General is eligible for temporary protected status only if such alien establishes that he or she:

- (a) Is a national, as defined in section 101(a)(21) of the Act, of a foreign 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 TPS 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. 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 applicant submitted the following:

1. A summons (# [REDACTED]) and court disposition indicating that, on January 18, 2000, in Fairfax County General District Court, in Fairfax County, Virginia, the applicant pleaded guilty to one count of (DWI), 3rd offense within 10 years, under Virginia (VA) Code § 18.2-266, for an arrest that occurred on April 25, 1999. He was sentenced to 180 days in jail, suspended; and,
2. A summons (# [REDACTED]) and court disposition indicating that, on January 2, 1994, the Fairfax County General District Criminal Court, in Fairfax County, Virginia, found the applicant guilty of one count of Drunk in Public, under Fairfax County Ordinance § 5-1-1.

The applicant also submitted the arrest warrant for an arrest that occurred on April 25, 1999, indicating that the applicant was charged with DWI, 2nd offense within 10 years (Summons # [REDACTED]). The applicant did not submit the court disposition for that case. He did, however, submit the results of a criminal record check from the Fairfax County Police Department, indicating that on January 18, 2000, he was also found guilty of DWI and was sentenced to 90 days in jail, suspended.

In Virginia, a conviction for a 2nd DWI within 10 years is classified as a Class 1 misdemeanor and can result in a maximum sentence of 12 months in jail.

A conviction for a Drunk in Public county ordinance is classified as a criminal violation that does not result in any jail time.

A conviction for a 3rd DWI within 10 years is classified as a Class 6 felony and may result in a maximum sentence of not less than 1 year, and no more than 5 years in prison.

On August 13, 2003, the director denied the application, finding that the applicant was not eligible for TPS because he had been convicted of two or more misdemeanors. The record indicates that the applicant has been convicted of one criminal violation, at least one misdemeanor, and one felony. The director's determination that the applicant was convicted of two misdemeanors is incorrect. Therefore, the director's decision to deny the application on this ground is withdrawn.

The record, however, establishes that the applicant has been convicted of one felony, which does preclude him from TPS eligibility. The applicant's assertion that DWI is a traffic offense, and not a crime, is not persuasive, as DWI in Virginia is classified as a felony and can result in imprisonment of at least one year and up to five years.

An alien applying for TPS has the burden of proving that he or she meets the requirements listed above and is otherwise eligible under the provisions of section 244 of the Act. The applicant has not met this burden.

ORDER: The appeal is dismissed.