

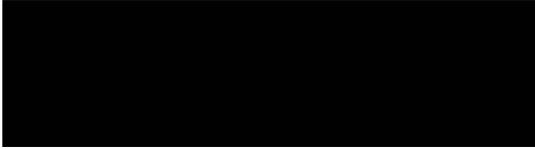
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

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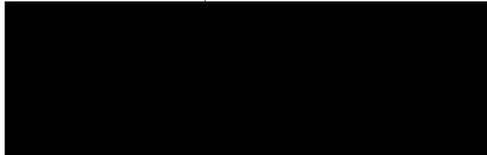


FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: JAN 03 2008
[WAC 0122652005]

INRE: 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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The applicant's Temporary **Protected** Status (TPS) was withdrawn by the Director, Vermont Service Center, and is now before the **Administrative** Appeals Office on appeal. The case will be remanded for further consideration and action.

The applicant claims to be 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** the applicant was convicted of the possession of a controlled narcotic substance (cocaine).

On appeal, counsel **states**:

The attached decision of the U. S. Citizenship and Immigration service incorrectly states in part "On March 15, 2006, you plead guilty **and** were convicted of I 1350(A) H&S possession of narcotic control substance by the Superior Court of California, County of Los Angeles.

Petitioner's charges were dismissed per 1210.1 P.C., proposition 36 Program. (Certified Minute Order-Disposition attached herewith) Therefore, there is no "conviction" as that term is defined in INA (a)(48)(A), accordingly, petitioner is not inadmissible to the US and his TPS should be reinstated. ...

Section 244(c) of the Act, and the related regulations at 8 C.F.R § 244.2, provide **that** an applicant who is a national of a foreign state is eligible for TPS **if** the 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
 - (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 that 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. 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(3) 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.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC 802). Section 212(a)(2)(A)(i)(II) of the Act.

The record shows that on March 15, 2006, in the Superior Court of California, County of Los Angeles, California, Case Number _____ the applicant pled guilty and was convicted of the possession of a narcotic controlled substance (cocaine), a violation of H&S § 11350(a).

The record shows that on June 15, 1992, in the Municipal Court of Los Angeles, Criminal Judicial District, County of Los Angeles, California, Case No. _____ (arrest date **June 11, 1992**), the applicant was indicted for possession of a narcotic controlled substance, 11350(a) H&S. On March 22, 2006, the applicant was sentenced to probation for three years, to pay a restitution fine of \$200 and to complete a Proposition 36 drug treatment program that would lead to the dismissal of his case upon satisfactory completion. On June 4, 2007, the court ordered the applicant's Proposition 36 program to be terminated and his guilty plea was set aside pursuant to section 1210.1 P.C., Diversion in California, pursuant to section 1210.1 P.C., is not a conviction for immigration purposes. The applicant, in this case, successfully completed diversion, and the case was dismissed.

The applicant, in this case, was not convicted of the above offense. Therefore, he is not inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, and is not ineligible under the provisions of section 244(c)(2)(B)(i) of the Act.

The record contains two letters to the applicant dated March 2, 2007, from the Deputy Clerk of the Superior Court of Los Angeles County. The first letter refers to the **name** _____ and an AKA _____ with a birth date of May 21, 1968. The letter indicates that no felony record **exists** under these names and birth date for an arrest on March 2, 2004 by the Los Angeles Police Department for infliction of corporal injury on a spouse and on March 2, 2006, for "459 burglary." The second letter refers to the **name** _____ and an AKA _____ with a birth date of May 21, 1968. This letter indicates that no felony record exists under these names and birth date for "An arrest for a 459 PC Burglary on 03/02/2006 by LAPD and for inflict corporal injury, spouse on 03/02/2006 by LAPD." It is noted that the applicant's birth certificate and his applications list his birth date as being April 21, 1969. The applicant shall be requested to explain the relevance of these two letters to his case.

The applicant has provided no further evidence to establish that he is a national or citizen of El Salvador. The record does not contain any photo identification such as a passport or national identity document to establish his nationality. 8 C.F.R. § 244.2(a) and § 244.9(a)(1). Therefore, the case will be remanded and the director shall fully adjudicate the application. The director may request any evidence deemed necessary to assist with the determination of the applicant's eligibility for TPS. **In these proceedings**, the burden of proof rests solely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The case is remanded for further action.