

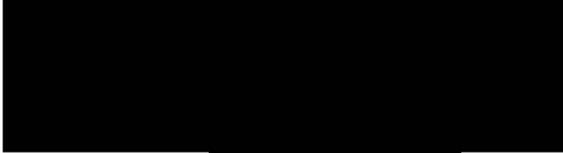
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u.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



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

PUBLIC COPY



FILE:

[WAC 05 158 72549]
[EAC 06 348 79002]

Office: CALIFORNIA SERVICE CENTER

Date:

JAN 11 2008

INRE:

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.

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The re-registration applications were denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant claims to be 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 director denied the re-registration applications because the applicant's convictions rendered him ineligible for the benefit being sought.

The first issue the AAO will address is the untimely filing of the appeal.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

The director's decision of denial is dated August 11, 2007. Any appeal must be properly filed within thirty days after service of the decision. 8 C.F.R. § 103.3(a)(2)(i). The appeal was initially received at the California Service Center on September 12, 2007; however, it was rejected as it was not accompanied by the correct filing fee. The appeal was properly received at the California Service Center on September 28, 2007, 48 days after the decision was issued.

While the director indicated that the fee to file an appeal on Form I-290B is \$385.00 in the Notice of Decision, that fee was increased to \$585.00 effective July 30, 2007. *See* 72 Fed. Reg. 29851-29874 (May 30, 2007) and 8 C.F.R. § 103.7(b)(3). The director's Notice of Decision was issued 12 days after the fee increase took effect.

As the untimely filing of the appeal was due to the director's incorrect advice on the Notice of Decision, the appeal will be treated as timely filed.

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) (I) 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).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception 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 actually served. Under this exception, for purposes of 8 C.F.R. § 244 of the Act, the crime shall be treated as a misdemeanor. 8 C.F.R. § 244.1.

"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. 8 C.F.R. § 244.1.

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.

On October 17, 2005, counsel submitted the requested court dispositions which revealed the following:

1. On March 10, 1997, the applicant was arrested under the alias, [REDACTED] by the Redwood City Sheriffs Office in California and subsequently charged with being under the influence of a controlled substance, a violation of section 11550 H&S; possession of marijuana, a violation of section 11357(b) H&S; and possession of a controlled substance, a violation of section 11350(a) H&S. On May 14, 1997, the applicant pled *nolo contendere* to violating section 11350(a) H&S, a felony. The applicant was placed on diversion, which was successfully completed and was **term i** __ 15, 2001. The remaining charges were dismissed on May 14, 1997. Case no.

2. On October 8, 2002, the applicant was arrested by the San Francisco Police Department in California for driving under influence of alcohol, a violation of section 23152(a) VC. On February 5, 2003, the applicant pled *nolo contendere* to the charge and was sentenced to serve 90 days in jail, ordered to pay a fine and placed on probation for three years. The applicant subsequently violated the terms of his probation and bench warrants (W# and W) were issued on January 8, 2003, and on February 18, 2004. On March 1, 2004, the applicant's probation was reinstated on the original terms and conditions. Case no. [REDACTED]

On appeal, counsel asserts that the applicant has been convicted of only a misdemeanor offense. The record, however, does not support counsel's assertion.

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Immigration and Nationality Act.

The court disposition submitted for number two reflects that the applicant pled *nolo contendere* to the drug offense and the judge ordered some form of punishment to the charge above. Therefore, the applicant has been "convicted" of the offense for immigration purposes.

The applicant is ineligible for TPS due to his felony conviction detailed above. Section 244(c)(2)(B)(i) of the Act and 8 C.F.R. § 244.4(a). Consequently, the director's decision to deny the applications for this reason will be affirmed.

While the issue of the applicant's inadmissibility was not raised by the director, the drug conviction renders him ineligible for TPS due to his inadmissibility under section 212(a)(2)(A)(I)(II) of the Act. Therefore, the applications must also be denied for this reason. There is no waiver available for inadmissibility under this section of the Act.

The record reflects that the applicant was ordered removed *in absentia* by an immigration judge on July 3, 1990. On August 2, 1990, a Form 1-205, Warrant of Deportation, was issued by the District Director, San Antonio, Texas.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. An alien applying for TPS 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.