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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: APR 05 2004

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: Self-represented

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, Director
Administrative Appeals Office

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The application was denied by the Director, Vermont Service Center, and 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 determined that the applicant was ineligible for TPS because he had been convicted of two misdemeanors committed in the United States. The director, therefore, denied the application.

On appeal, the applicant asserts that his convictions are not misdemeanors, that one of the offenses is 17 years old, and that the other offense (driving while impaired) is classified as a violation.

Although a Notice of Entry of Appearance as Attorney or Representative (Form G-28) has been submitted, the individual named is not authorized under 8 C.F.R. § 292.1 or § 292.2 to represent the applicant. Therefore, the applicant shall be considered as self-represented.

Section 244(c) of the Act, and the related regulations in 8 C.F.R. § 244.2, provide that an alien who is a national of a foreign state 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.

Pursuant to section 244(c)(2)(B)(i) of the Act and the related regulations in 8 C.F.R. § 244.4(a), an alien shall not be eligible for temporary protected status if the Attorney General [now the Secretary of the Department of Homeland Security (the Secretary)] finds that the alien has been convicted of any felony or two or more misdemeanors committed in the United States.

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.
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> *Misdemeanor* means a crime committed in the United States, either:
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> (1) Punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or
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> (2) A crime treated as a misdemeanor under the term "felony" of this section.
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> For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a felony or misdemeanor.

The record reflects the following:

1. On March 16, 1986, in Yaphank, New York, the applicant was arrested and charged with Count 1, operating a motor vehicle while under the influence of alcohol, New York Vehicle & Traffic Law (VTL) 1192.2; and Count 2, operating a motor vehicle while under the influence of alcohol, VTL 1192.3. On April 22, 1986, in the District Court of the County of Suffolk, New York, Docket No. 3016566-3016567, the applicant entered a plea of guilty as to Count 1, he was ordered to pay $350 in fines, and his driver's license was suspended. Count 2 was dismissed.

2. On January 21, 1996, in Yaphank, New York, the applicant was arrested and charged with operating a motor vehicle while under the influence of alcohol, VTL 1192.3. On May 28, 1996, in the District Court of the County of Suffolk, New York, Docket No. 328439, the applicant was convicted of the amended charge of VTL 1192.1, driving while ability impaired. He was ordered the pay $525 in fines.

The applicant, on appeal, asserts that he was not convicted of two misdemeanors because one of the charges is classified a violation.

Although New York VTL 1193.1 states that driving while ability impaired (VTL 1192.1) shall be a traffic infraction, VTL 1193.1 further states that this crime "shall be punishable by a fine of not less than three hundred dollars nor more than five hundred dollars or by **imprisonment in a penitentiary or county jail for not more than fifteen days**, or by both such fine and imprisonment." (Emphasis added.) Consequently, VTL 1192.1 (paragraph 2 above) is a misdemeanor as defined in 8 C.F.R. § 244.1.

Furthermore, although the applicant asserts that his conviction listed in paragraph 1 above is 17 years old, a time limitation is not provided for criminal activities for TPS applicants under section 244(c)(2)(b) of the Act, and as provided in 8 C.F.R. § 244.4(a). Clearly, the applicant must meet the eligibility requirements at the time the application is filed, as well as at the time the application is approved.

The applicant is, therefore, ineligible for TPS, pursuant to section 244(c)(2)(B)(i) of the Act, based on his two misdemeanor convictions. There is no waiver available to an alien convicted of a felony or two or more misdemeanors committed in the United States.

The burden of proof is upon the applicant to establish that he 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.