

Identifying cases related to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



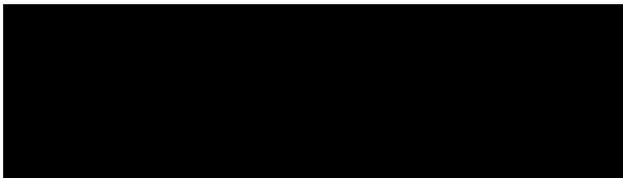
M

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 03 2005
[WAC 01 238 51107]

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:



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, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California 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, counsel submits a brief and additional evidence.

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.

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 felony or misdemeanor.

The record shows that on August 13, 1998, in the Municipal Court of Los Angeles, Central Arraignment Judicial, County of Los Angeles, California, Case No. [REDACTED] the applicant was convicted of Count 1, disorderly conduct: prostitution, 647(b) PC, a misdemeanor; and Count 2, unlicensed driver, 12500(a) VC, a misdemeanor. He was placed on probation for a period of 12 months, ordered to spend 5 days in jail, pay the total of \$519 in fines, costs and restitution, and attend and complete an AIDS education class as to Count 1. He was placed on probation for a period of 12 months, and ordered to spend 2 days in jail as to Count 2.

Counsel, on appeal, asserts that the applicant was convicted of only one misdemeanor because one conviction was reduced to an infraction. Counsel further asserts that the two convictions arose from a single criminal act, occurring one evening in 1998, and that, therefore, the crimes cannot be considered two separate convictions for immigration purposes.

The record shows that on December 3, 2003, more than 5 years later, the court granted the applicant's motion to reduce Count 2, 12500 VC, to an infraction, and terminated proceedings. However, the Board of Immigration Appeals (BIA), in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), held that under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Therefore, the applicant remains convicted, for immigration purposes, of the misdemeanor offense of unlicensed driver (Count 2 above).

Furthermore, counsel's assertion that the two convictions arose from a single criminal act, and the crimes cannot be considered two separate convictions of any type, is not persuasive. The fact that the offenses arose from a common scheme does not preclude them from being counted as separate offenses. The applicant was charged with two separate counts, he pled guilty to two separate offenses, and the court issued two separate sentences.

Black's Law Dictionary, 314 (5th Ed., 1979), defines the term "count" to mean a separate and independent claim. It also indicates that the term "count" is used to signify the several parts of an indictment, each charging a distinct offense; therefore, the applicant had been convicted of two separate and distinct offenses. Moreover, Congress did not make any special allowances for TPS applicants who had been convicted of multiple counts under the same criminal case.

Accordingly, the applicant is 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.

It is noted that the record of proceeding contains an outstanding Warrant of Removal/Deportation, Form I-205, issued on November 12, 1997, and that the applicant failed to appear at the Los Angeles district office on December 12, 1997, for his enforced departure.

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

ORDER: The appeal is dismissed.