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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

M1

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 05 2007
[EAC 02 220 52272]

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, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center (VSC), 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 denied the application because the applicant failed to establish that he had continuously resided in the United States since February 13, 2001, and had been continuously physically present in the United States since March 9, 2001. The director also determined that the applicant had been convicted of two misdemeanor offenses.

On appeal, the applicant asserts his claim of 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 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) (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 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.

The phrase continuously physically present, as defined in 8 C.F.R. § 244.1, means actual physical presence in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences as defined within this section.

The phrase continuously resided, as defined in 8 C.F.R. § 244.1, means residing in the United States for the entire period specified in the regulations. An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual and innocent absence as defined within this section or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

Persons applying for TPS offered to El Salvadorans must demonstrate continuous residence in the United States since February 13, 2001, and continuous physical presence in the United States since March 9, 2001. An extension of the program for El Salvadorans was granted from September 9, 2003 until March 9, 2005. Subsequent extensions of the TPS designation have been granted with the latest extension valid until March 9, 2009, upon the applicant's re-registration during the requisite time period.

The burden of proof is upon the applicant to establish that he or she meets the above requirements. Applicants shall submit all documentation as required in the instructions or requested by Citizenship and Immigration Services (CIS). 8 C.F.R. § 244.9(a). The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. To meet his or her burden of proof, the applicant must provide supporting documentary evidence of eligibility apart from his or her own statements. 8 C.F.R. § 244.9(b).

The record of proceeding shows that the applicant submitted his TPS application on June 14, 2002. The VSC director denied that application on December 13, 2004, due to abandonment, because the applicant failed to report for fingerprinting as scheduled. The applicant filed a Motion to Reopen on January 8, 2005. On March 23, 2005, the VSC director again denied the TPS application because the applicant failed to report for fingerprinting as scheduled. The applicant filed a Motion to Reopen on May 4, 2005, stating that he had not received the notice to appear for fingerprinting. The VSC director sent the applicant a Notice of Intent to Deny on February 3, 2006 and April 28, 2006. The applicant responded to the director's notice on May 30, 2006. The VSC director denied the TPS application on June 23, 2006, after determining that the applicant had been convicted of two misdemeanors, and because the applicant had failed to submit sufficient evidence to establish continuous residence and continuous physical presence in the United States.

The applicant submitted the following documentation:

1. Copies of Western Union money transfer receipts bearing the applicant's name and dated September, October, and November of 2002, and February and March of 2003;
2. Copies of the applicant's Form W-2, Wage and Tax Statements for the 2001 tax year;
3. A copy of the applicant's Passport issued to him in Washington, D.C., on December 19, 2001; and,
4. An affidavit from [redacted] in which she stated that she has known the applicant to be present in the United States since September 25, 2000.

The director determined that the applicant had failed to submit sufficient evidence to establish his eligibility for TPS and denied the application on June 23, 2006.

On appeal, the applicant states that he has submitted evidence to establish his presence in the United States since 2001, and submits the following documentation:

5. A copy of an Immigration and Naturalization Service (INS) receipt notice dated August 26, 2003;
6. Copies of INS receipt notices dated January, April, and May of 2005;
7. Copies of postmarked certified mail receipts and money order receipts dated 2002, 2003, and 2005;
8. Copies of the applicant's pay statements from Town and [redacted], dated July and August of 2003;
9. A copy of the applicant's Employment Authorization card dated from September 11, 2003 to March 9, 2005;
10. Copies of the applicant's Employment Authorization replacement card notices dated July of 2002, and January and September of 2003; and,
11. A copy of a letter to the applicant from the Social Security Administration dated July 26, 2002.

The applicant has not submitted sufficient evidence to establish his qualifying continuous residence since February 13, 2001, and continuous physical presence since March 9, 2001, in the United States. The applicant submitted an affidavit (see number 4 above) in an effort to establish his residence and physical presence in the United States during the requisite time periods. Although the affiant states that she has known the applicant to be present in the United States since September of 2000, there has been no corroborative evidence to substantiate the assertions. The applicant claims to have been present in the United States since September of 2000. It is reasonable to expect that he would have some type of contemporaneous evidence to support these assertions; however, no such evidence has been provided. Without corroborative evidence, the affidavits from acquaintances do not substantiate clear and convincing evidence of the applicant's continuous residence and continuous physical presence in the United States.

Moreover, affidavits are only specifically listed as acceptable evidence for proof of employment, and attestations by churches, unions, or other organizations of the applicant's residence as specifically described in 8 C.F.R. §244.9(a)(2)(i) and (v).

The copies of the money order receipts (see number 1 above) provided by the applicant are not supported by any other corroborative evidence. While 8 C.F.R. § 244.9(a)(2)(vi) specifically states that additional documents such as money order receipts "may" be accepted in support of the applicant's claim, the

regulations do not suggest that such evidence alone is necessarily sufficient to establish the applicant's qualifying residence or physical presence in the United States. The sufficiency of all evidence will be judged according to its relevancy, consistency, credibility, and probative value. 8 C.F.R. § 244.9(b). The copies of the Wage and Tax Statements (see number 2 above) submitted by the applicant do not indicate during which months in 2001 [redacted]. employed the applicant.

All other evidence submitted by the applicant is dated subsequent to February 13, 2001, and March 1, 2001; and therefore, cannot be used to establish the applicant's presence in the United States on or before those dates. Therefore, the applicant has failed to establish that he has met the continuous residence and continuous physical presence criteria described in 8 C.F.R. §§ 244.2(b) and (c). Consequently, the director's decision to deny the application for TPS will be affirmed.

A second issue to be addressed is whether the applicant has been convicted of a crime or crimes that render him ineligible for TPS.

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).

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.
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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 misdemeanor.

Under section 101(a)(48) of the Act:

> (A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if 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.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

The director denied the TPS application on June 23, 2006, after determining that the applicant had been convicted of two or more misdemeanors committed in the United States.

On appeal, the applicant submits copies of the final court dispositions and states that he did not lay a hand on his wife, that he does not know why he was found guilty of assault and battery, and that he paid all fines associated with the case and was not incarcerated for more than one day. The applicant also states that the charge of carrying a dangerous weapon was dismissed.

The record of proceedings indicates that the applicant was found guilty of assault and battery, a misdemeanor, in the Commonwealth of Virginia on June 26, 2003, and sentenced to 30 days incarceration that was suspended conditioned upon being of good behavior, and $600.00 of fines and penalties. The record also indicates that the criminal court in Fairfax County, Virginia, determined that there existed facts sufficient to find guilt on the part of the applicant of carrying a weapon, dagger type knife, a misdemeanor, on April 6, 2005. The court deferred adjudication until July 6, 2006, and imposed a sentence of 25 hours of community service and fines totaling $167.00.

The record of proceeding reveals that the applicant has been convicted of two misdemeanor offenses committed in the United States. Although the Virginia court decided to continue the applicant's case for possible dismissal upon completion of the terms of probation, the judge found facts sufficient to find guilt, the record shows that the applicant's liberty was restrained in that he was placed on probation or court supervision to enter and complete 25 hours of community service and to pay fines totaling $167.00. Therefore, the applicant has been "convicted" as defined in Section 101(a)(48)(A) of the Act. Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under state law.

State rehabilitative actions that do not vacate a conviction on the merits are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan,* I.D. 3377 (BIA 1999). The charges in the instant case are considered misdemeanor offenses as defined in 8 C.F.R. § 244.1. An applicant who has been convicted of two misdemeanors or one felony in the United States is ineligible for TPS. 8 C.F.R. § 244.4(a). The applicant remains convicted of two misdemeanor offenses; and therefore, the director's decision with respect to this issue will be affirmed.

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

ORDER: The appeal is dismissed.