U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 04 2009

[EAC 07 284 75499]

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 Vermont Service Center. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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 failed to establish he had: 1) continuously resided in the United States since February 13, 2001; and 2) been continuously physically present in the United States since March 9, 2001. The director also determined that the applicant had been convicted of two or more misdemeanors. The director, therefore, denied the application.

The appeal was filed by a representative; however, the representative has not submitted a properly filed Form G-28, Notice of Entry of Appearance as Attorney or Representative. Therefore, the decision will be furnished only to the applicant.

On appeal, the applicant states that his misdemeanor convictions all arose from the same course of conduct and were part of the same criminal complaint. The applicant also states that he was given an initial grant and all subsequent renewals which eliminate any question as to his continuous physical presence or residence.

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 as 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.

(g) Has filed an application for late registration with the appropriate Service director within a 60-day period immediately following the expiration or termination of conditions described in paragraph (f)(2) of this section.

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.

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 that they have continuously resided in the United States since February 13, 2001, and that they have been continuously physically present in the United States since March 9, 2001. On July 9, 2002, the Attorney General announced an extension of the TPS designation until September 9, 2003. Subsequent extensions of the TPS designation have been granted, with the latest extension granted until September 10, 2010, upon the applicant's re-registration during the requisite period.

The initial registration period for El Salvadorans was from March 9, 2001 through September 9, 2002. The record shows that the applicant filed this application on July 16, 2007.

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 United States Citizenship and Immigration Services (USCIS). 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 first issue in this proceeding is whether the applicant has established his continuous residence in the United States since February 13, 2001, and his continuous physical presence in the United States since March 9, 2001.

In support of his TPS application, the applicant submitted copies of his birth certificate, with English translation; an Official Transcript of GED Test Results dated February 1, 2007; a letter from [redacted] In-Store Recruiter for Safeway; an undated High School Equivalency Certificate; unsigned 2001 – 2005 Form 1040, U.S. Individual Tax Returns and evidence that is already part of the record.

[redacted] states that the applicant has been employed by Safeway since March 2007. However, this letter has little evidentiary weight or probative value as it does not provide basic information that is expressly required by 8 C.F.R. § 244.9(a)(2)(i). Specifically, the affiant does not provide the address where the applicant resided during the period of his employment. It is further noted that Ms. [redacted] can only attest to the applicant's presence in the United States since March 2007. The tax documents indicate the applicant was employed during those years, but can not establish the applicant's continuous residence since February 13, 2001, and his continuous physical presence in the United States from March 9, 2001 to the date of filing the TPS application. Furthermore, these documents are unsigned and do not indicate they were ever actually filed, further reducing their probative value. The GED Test Results Transcript is dated subsequent to the qualifying dates to establish continuous residence and continuous physical presence and is therefore of little or no probative value.

The record shows that the applicant filed his TPS application on July 16, 2007. The director determined that the applicant failed to submit sufficient evidence to establish his continuous residence and continuous physical presence in the United States during the qualifying period. Therefore, the director denied the application.

On appeal, the applicant states that he had been given an initial grant of TPS and all subsequent renewals were also approved, which eliminates any question regarding his continuous physical presence or residence. According to the applicant the Notice of Intent to Deny only asked for court records and made no references to the need to prove continuous physical presence and residence. The applicant claims that he was entitled to rely upon the past approvals and the lack of any request in the notice to conclude that the residence and continuous physical presence were not issues in his application and that it is denial of due process to deny on a ground not raised in the Notice of Intent to Deny. However, the applicant incorrectly attributes the granting of employment authorization as approval of his TPS application. In fact, the applicant was granted employment authorization contingent on the approval of his TPS application. Once the TPS application was dismissed, the applicant was no longer eligible for this benefit. Furthermore, contrary to the applicant's assertions, he is instructed that he should submit **all** documentation as required in the instructions of the application when he files the application. (Emphasis added). USCIS is not required to specifically request additional evidence in the Notice of

Intent to Deny. Rather, the notice is a means by which to inform the applicant that his or her application is lacking sufficient evidence for approval.

The applicant has not submitted sufficient evidence to establish his qualifying residence since February 13, 2001, and his continuous physical presence in the United States from March 9, 2001 to the date the application was filed. He has, therefore, failed to establish that he has met the criteria described in 8 C.F.R. § 244.2(b) and (c). Consequently, the director's decision to deny the application for temporary protected status on these grounds will also be affirmed.

The second issue in this proceeding is whether the applicant has been convicted of two or more misdemeanors in the United States.

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.
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> *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.

The record reveals the following offenses:

> (1) On May 7, 2007, the applicant was arrested by the San Jose, California Department of Corrections for "Vandalism," "Assault of Custodial Officer," and "Under Influ/Alcohol/Drugs." [redacted]

The applicant was requested on April 28, 2008 to submit the final court disposition for each of the charges detailed above. In response, the applicant submitted the requested court documents. According to the final court disposition, on October 2, 2007, the applicant pled nolo contendere and was convicted of three counts of "Vandalism $400 or More," misdemeanors, and one count of "Fighting in a Public Place," a misdemeanor.

On appeal, the applicant claims that the misdemeanors all arose from the same course of conduct and were part of the same criminal complaint, and therefore count as one conviction. However, while the determination of whether the applicant's crimes arose "out of a single scheme of criminal misconduct" may be relevant to an individual's removability under section 237 of the Immigration and Nationality Act (the Act), this determination has no bearing on the applicant's eligibility for TPS. *Black's Law Dictionary*, 353 (7th Ed., 1999) defines the term "count" to mean a separate and distinct claim in a complaint or similar pleading. It also indicates that the term "count" is used to signify the part of an indictment charging a distinct offense. According to the court disposition, the applicant was charged with four separate violations to which he pled nolo contendere to four separate crimes and the court ordered four separate punishments. Therefore, the applicant has been convicted of two separate and distinct misdemeanor offenses.

The applicant is ineligible for TPS because of his misdemeanors convictions.

Beyond the director's decision, it is noted that although the applicant has submitted a copy of a birth certificate with English translation, it was not accompanied by a passport or any national identity document from the alien's country of origin bearing photo and/or fingerprint to establish his nationality and identity. Therefore, the application must be denied on this basis as well.

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 temporary protected status 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.