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U.S. Department of Homeland Security
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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MAY 21 2009

FILE: [REDACTED] OFFICE: VERMONT SERVICE CENTER DATE:
[EAC 07 198 70328]

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 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. The application 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 he found the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act due to his drug-related conviction. The director also found the applicant inadmissible under section 212(a)(3)(E)(iii) of the Act due to his having assisted in the extrajudicial killing of a guerilla commander, and, under section 208(b)(2)(A) due to having participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

On appeal, counsel for the applicant states that the applicant is seeking TPS and not adjustment of status, therefore, the director's decision misapplied the law. Counsel also states that the applicant was not informed by the notice of intent to deny of the allegations of the "alleged extrajudicial killings."

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.

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.

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.

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act.

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.

The record reflects that the applicant was arrested by the Washington, DC Police Department on September 25, 1995 for "Possession With Intent to Distribute Marijuana" and on June 5, 1997 for "Possession of Marijuana." The applicant submitted documentation from the Superior Court of the District of Columbia which indicates these charges were *nolle prosequi* on May 6, 1996 and November 5, 1997, respectively. The applicant was also arrested by the Arlington County, Virginia Police Department on April 16, 1997 for "Possession of Marijuana" and was convicted on May 23, 1997. Documentation submitted by the applicant reflects probation for SIS 12 months, 66B, suspension of his driver's license for six months and 40 hours of community service. The charge was later dismissed on July 20, 1998. In addition, counsel stated in her April 11, 2007 letter to USCIS that the applicant had been arrested on a charge of "Possession of Marijuana" on February 9, 2006, in Prince William County, Virginia. Counsel states the case was *nolle prosequi* on July 12, 2006, however, the final court disposition is not in the record. USCIS must address this arrest in any future proceeding.

On appeal, counsel for the applicant states that the applicant has only one conviction for simple "Possession of Marijuana." According to counsel, the applicant is seeking TPS and not adjustment of status or admission; therefore, the law was misapplied by the director. However, the pertinent section of the Act, section 212(a)(2)(A)(i)(II) applies to TPS applicants as well as adjustment of status and admission applicants. Furthermore, as discussed by the director, this ground of inadmissibility may not be waived for TPS applicants.

Counsel also contends that the applicant was never given the opportunity to respond to the issue regarding "extrajudicial killings." However, the applicant testified that he served in the Special Forces of the El Salvadoran Navy from January 1985 to June 1988 and his special unit called '██████████' was responsible for conducting reconnaissance missions and infiltrating the guerrillas. The applicant testified that he interrogated people and then turned them over to others, but that he did not know what happened to them afterwards. Moreover, he further testified that at one point he was ordered to find and kill a guerilla commander Concho Rivera. According to the applicant's testimony, the applicant's unit found the guerrilla commander and one of the other members of the unit killed the commander while he hid behind a tree. The director found, based on the applicant's testimony that the applicant had assisted in the extrajudicial killing of the guerilla commander. Counsel states that the director did not "solicit a response on the issue of alleged 'extrajudicial killings'" and the applicant did not have an opportunity to attempt to refute the director's finding. However, the applicant was instructed in the decision that if he had additional evidence that shows the decision to be in error, he could provide it with his appeal. The applicant failed to provide any evidence or documentation to overcome the director's finding. Therefore, the record must be considered complete. Consequently, the applicant is not eligible for TPS based on his inadmissibility under section 212(a)(3)(E)(iii) and section 208(b)(2)(A).

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.