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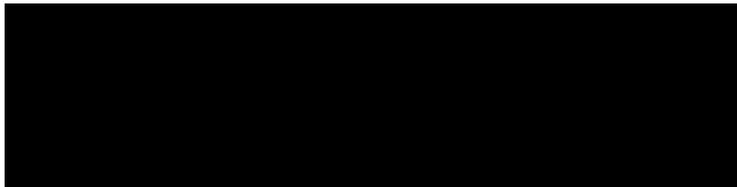
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] OFFICE: CALIFORNIA SERVICE CENTER DATE: JUN 25 2007
[WAC 01 170 52590]

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:
[REDACTED]

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.

Cindy N. Gomez for
Robert P. Wiemann, Chief
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 The director's decision will be withdrawn, and the appeal will be sustained.

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 had been convicted of drug-related offenses.

On appeal, counsel submits a statement and additional evidence.

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, 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 shows that on October 5, 1995, in the Municipal Court of the State of California, County of Monterey, King City Division, Case No. [REDACTED] (arrest date October 4, 1995), the applicant was indicted for Count 1, possession of a narcotic controlled substance, in violation of Health and Safety Code (H&S) 11350(a), a felony; and Count 2, under the influence of a controlled substance, H&S 11550(a), a misdemeanor. On January 3, 1996, the applicant was admitted to a diversion program pursuant to Penal Code 1000, and criminal proceedings were suspended for one year.

On appeal, counsel asserts that the evidence does not support the director’s finding that the applicant has been “convicted” of a crime that renders him statutorily ineligible for TPS. He contends that although the applicant was charged with the criminal violation, the charge was dismissed after successful completion of diversion pursuant to CA PC 1000. He submits the final court disposition to support his claim.

Pursuant to section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101((a)(48)(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.

Under the diversion program, a defendant is not required to enter a plea or to admit any facts sufficient to warrant a finding of guilty. The record indicates that the applicant did not enter a plea of guilty or *nolo contendere*, nor did the judge find the applicant guilty of the offense detailed above. On May 10, 1996, diversion was terminated

and the case was dismissed by the court. The applicant, in this case, was not convicted of the felony and misdemeanor drug offenses within the meaning of section 101(a)(48)(A) of the Act. Nor is he inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act. As the applicant is not ineligible for TPS pursuant to section 244(c)(2)(B)(i) of the Act, this finding of the director will be withdrawn.

The applicant has furnished sufficient evidence to establish that he has continuously resided in the United States since February 13, 2001, and has been continuously physically present since March 9, 2001, as described in 8 C.F.R. §§ 244.2(b) and (c).

Accordingly, the director's decision will be withdrawn, and the application will be approved.

The record shows that on January 9, 2002, in San Francisco, California, the Immigration Judge administratively closed removal proceedings based on the filing of a TPS application by the applicant. It is also noted that the applicant is the beneficiary of an approved Form I-130, Petition for Alien Relative, filed on his behalf by his lawful permanent resident spouse.

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 met this burden.

ORDER: The appeal is sustained and the application is approved.